# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1916.

## No. 832.

TEXAS & NEW ORLEANS RAILROAD COMPANY AND LOUISIANA WESTERN RAILROAD COMPANY AND THEIR SURETY, THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFFS IN ERROR,

vs.

FELIX GROSS AND THERESA GROSS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED DECEMBER 27, 1916.

(22,453.)

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1 *Caption.*

THE STATE OF TEXAS,
*County of Harris:*

At a term of the District Court begun and holden at Houston, Texas, within and for the County of Harris, before the Honorable Chas. E. Ashe, Judge of the Eleventh Judicial District Court in and for the said County on the 7th day of December, 1908, and ending on the 30th day of January, A. D. 1909, the following cause came on for trial, to-wit:

**No. 39491.**

FELIX & THERESA GROSS, Plaintiffs,
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Defendants.

*Plaintiffs' First Amended Original Petition.*

**Filed May 19, 1908.**

In the District Court of Harris County, 55th Judicial District, May Term, A. D. 1908.

**No. 39491.**

**FELIX & THERESA GROSS**
vs.
**T. & N. O. R. R. Co. et al.**

Comes now, Felix Gross and Theresa Gross, husband and wife, by their attorneys, and with leave of court first had and obtained, file this their first amended original petition in lieu of their original petition filed herein on the — day of ——, A. D. 19—.

2 In the District Court of Harris County, 55th Judicial District, May Term, 19—.

STATE OF TEXAS,
*Harris County:*

To said Court:

Felix Gross and Theresa Gross, plaintiffs, complaining of the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, defendants, represent:

**I.**

That plaintiffs are husband and wife and reside together in Harris county, in the state of Texas; that defendants are each railway cor-

porations, duly incorporated; the defendant, Texas & New Orleans Railroad Company, having a local agent in said Harris County, and the defendant, Louisiana Western Railway Company, having a local agent in Orange County, in the state of Texas.

II.

That the railway of the defendant, Texas and New Orleans Railroad Company, extends from Houston in Harris County, to the line between the state of Texas and the state of Louisiana, and the railway of the defendant, Louisiana Western Railway Company, extends from the said state line to and beyond La Fayette, in the state of Louisiana.

III.

That said defendant companies are now and were at the time of the occurrence hereinafter related, engaged in a joint arrangement, the terms of which are unknown to plaintiff but well known to defendants, whereby they solicited joint business and made through rates for the carriage of passengers and freight over said railways and operated said railways as one continuous line between Houston, in Harris County, Texas, and La Fayette, in Louisiana, and used indiscriminately on one railway or the other, as the business or convenience required, the engines, rolling stock and employés of each other, and each hired for and discharged employés of both, and each required employés engaged by it to render
3 service on the line of the other; that the employés operating trains on said railways were required to make and did make continuous runs from said Houston to La Fayette, and return, and *vice versa* and that both defendants were in truth and in fact jointly engaged as common carriers of freight and passengers for hire, between Houston and La Fayette, over both of said railways, and were partners in such business, sharing in the profits and losses thereof.

IV.

That the railway of the Louisiana Western Railway Company, ran through a country in which there were great numbers of cattle and other animals which, before the same was fenced, habitually strayed upon the right of way and track and were a great menace to the safety of trains run upon the said railway and to employés engaged in operating them, and the exercise of ordinary care on the part of defendants, for the safety of their said employés, required that they should maintain substantial fences on either side of the railway for the purpose of excluding therefrom, cattle and other animals; that there were such fences maintained by defendants and that the said fences, when defendants used ordinary care to keep the same in reasonably safe repair and condition, and to keep the gates closed, as was their duty to do, constituted a complete barrier to all cattle and other animals, and defendants' said employés looked to defendants to use ordinary care to keep the said fences in proper repair and condition, to the end that they might

not be exposed to the peril of injury or death by the derailment of the engines and cars operated by them by coming in contact with such cattle or other animals.

V.

4 That on, to-wit, June 1, A. D. 1905, Corley Gross, who was a son of plaintiffs, was in the employ of defendants in the capacity of a fireman on locomotive drawing passenger trains operated by defendants over their said railways between Houston and La Fayette; and on said date he was fireman on a locomotive drawing one of defendants' passenger trains running from Houston to La Fayette over said railways; and that upon the train getting within about seven miles of the station known as Sulphur, in the state of Louisiana, and while running at an ordinary rate of speed, the said engine struck an animal of the cow species and was thereby, together with a number of cars, derailed, and a great quantity of steam and hot water and hot oil, confined about said engine and the tender thereof, escaped therefrom, and plaintiffs' said son was, by the said derailment, wounded and bruised, and was by the said steam and water and oil, scalded and burned, so that as a direct consequence of the injuries thus inflicted upon him, he thereafter, in about two weeks, died.

VI.

That the derailment of the said engine and cars and the death of plaintiffs' said son were directly and proximately caused by the negligence and carelessness of defendants, their servants, agents, and employés, other than those engaged with plaintiffs' said son in operating the said engine and train, in the following respects, to-wit:

First. That they permitted the said fence enclosing the right of way at and near the place where the said engine and cars were derailed to be out of repair, so that cattle could enter through the fence upon the right of way and track, and the said animal struck by the engine did enter that way. Or if the said fence was not out of repair, then a gate at or near the said place was left open and the said animal entered through the same; that defendants knew the said gate was open and allowed the same to remain open an
5 unreasonable length of time, in consequence of which the said animal entered upon the track; or if defendants did not know the said gate was open, they and their said servants and agents charged with a duty in that regard, would have known the same was open by the exercise of ordinary care in ample time to have had the same closed before the said animal entered upon the said railway.

Second. That the said animal that was struck by the engine as aforesaid, and several others of the same kind, had been on the inside of the fences enclosing the said right of way and track at and near the place where the said engine was derailed for a long time, to-wit: eight or ten hours; that defendants and their said servants and agents charged with a duty in that regard, knew of their presence within the said fences long enough to have had the cattle removed therefrom or to have notified the engineer and con-

ductor in charge of the said train of their presence within the said enclosure, and that had they been thus notified they and said deceased could and would have been on the lookout for said cattle and have avoided striking the same or any one of the same, or in any event have so regulated the speed of the train as to prevent a derailment; or if the defendants and their said servants and agents did not have actual knowledge of the presence of the said cattle within the right of way fences before the said engine was derailed, then they would have acquired such knowledge by the use of ordinary care, and have done it in ample time to have removed the said cattle therefrom.

Third. That the animal struck by the said engine, causing the derailment of the engine, as aforesaid, had been previously struck by another of defendants' engines from seven to ten hours before and crippled, and that those of defendants' servants and em-
6 ployés in charge of the said engine and cars left the said animal in a wounded and disabled condition by the side of the track, and the said animal scrambled back upon the track, where it remained in its wounded condition until struck, as aforesaid; and that the said animal in the condition in which it was left beside the track, would probably work its way onto the track and become a dangerous obstruction to trains running thereon, was a result that a person of ordinary prudence would have foreseen as likely to occur under the circumstances and have made provision against, and was a result the said employés, in the exercise of ordinary care, should have foreseen under the circumstances and have made provision against.

Fourth. That the ties supporting the rails at and near the place where the said animal was struck by said engine were old, worn and decayed, and the rails were old and worn, thus rendering the track and the road bed at said place in an unsafe and defective condition, so that the same were not strong enough to sustain the increased force placed upon the same as a result of the striking of the said animal and in consequence gave way, and that the said unsafe and defective condition of the track and roadbed was an efficient concurring cause with the striking of the said animal in producing the said derailment, and that the said result was one that defendants should have foreseen as likely to occur under the circumstances.

Fifth. That defendants had a written or printed rule or bulletin order promulgated by and in the name of the defendant Louisiana Western Railway Company, making it the duty of all employés, without regard to the department in which they served, to report obstructions of any kind to the superintendent of the said railway and when possible to the nearest section or bridge foreman
7 thereon, and defined as an obstruction, anything that would interfere with the safe passage of trains at full speed, and making it the duty of such foreman to turn out promptly with all their men and remove such obstruction whenever notified by trainmen or others, and this too, even though the obstruction was not on the section of the foreman receiving the notice; that this was the method adopted by defendants to perform the obligation they were

under to their employés to insure them a reasonably safe track for the running of the trains they were engaged in operating; that certain employés of defendants in charge of another engine and train some seven hours before the said derailment, discovered the presence of a number of cattle, including the one struck by the said engine, within the right of way fences at and near the place of the said derailment; that said employés well knew of the existence of said rule or bulletin order and knew that the cattle were an obstruction within the meaning of the said rule or bulletin order, and their duty to report them, yet, notwithstanding, they wholly failed to notify the superintendant of the said Louisiana Western Railway Company or any section foreman, which they could have done in ample time for the said cattle to have been removed and the derailment thus avoided.

Sixth. That the pilot or "cow catcher" at the front of the said engine, and which is an appliance intended for lifting and throwing animals and other objects from the track and thus preventing derailments, was constructed or adjusted to the front of the engine in such manner as that it turned up at the point and was too high above the track and as thus constructed or adjusted was an unsafe and dangerous appliance for the use for which it was intended; and the said pilot or cow catcher was further rendered an unsafe appliance for the purpose intended, in that, the iron bar attached to the top of the pilot for use in coupling onto cars, was made to lie when not in use, upon the front of the pilot and
8 to extend from the top at about the middle down to or beyond the point of the pilot, whereas, provision should have been made by defendants for the said bar to be drawn back toward the boiler head and there secured, which was not done; and that the said unsafe and dangerous condition of the pilot or cow catcher, when the same struck the said animal, which was lying down on the track, held the said animal upon the track instead of raising and throwing the same from the track, as would have been the case had the said pilot been properly constructed or adjusted, or the said bar had been secured back against the boiler head, and thus causing the said animal to be run upon and over by the said engine, and the said engine and cars to be derailed.

## VII.

That the plaintiff, Felix Gross, is — years of age and the said Theresa Gross is — years of age, and that their said son, Corley Gross, at the time of his death was a strong and healthy man, twenty-three years of age; that plaintiffs are and were without means of support of — own, and were dependent upon their said son for a support; that he was a dutiful son and out of his earnings, which — to-wit, one hundred ($100.00) dollars per month, he contributed to their support more than seventy dollars per month, and he would have continued to thus contribute to their support so long as he lived and they or either of them lived, and that by reason of his death they have been actually damaged in the sum of Twenty-five Thousand ($25,000.00) Dollars.

Plaintiffs further represent that by the statute law of the state of

Louisiana they are given a right of action against defendants and each of them, for the damages sustained by them by the death of their said son caused by their negligence, as aforesaid, which statute is similar to the statute of this state giving parents a right of action for damages for the death of their son as a result — negligence.

9 Premises considered, plaintiff- pray, that defendants each be cited according to law to answer this petition; that on trial hereof, they have judgment for their said damages; for costs of suit, and for general relief and they will ever pray.

BRASHEAR & DANNEBAUM,
LOVJOY & PARKER,
*Attorneys for Plaintiffs.*

Filed May 19th, 1908. Henry Albrecht, C. D. H. C. By A. J. Schweikart, Dpty.

*Original Answer of Defendant Louisiana Western Railway Company.*

Filed October 3rd, 1908.

In the District Court of Harris County, Texas, 55th Judicial District.

No. 39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

In the above entitled and numbered cause comes the Louisiana Western Railway Company, named as a defendant in the plaintiffs' petition herein, for the purpose of protesting against being required to appear and answer in this behalf, for the reason that, as shown by the statement and affidavit of C. W. Sedgwick on file herein, which is hereby referred to, it has not been cited or brought before this court *by* service of citation can or could be legally had for the purpose of bringing it into this court, or requiring it to enter its appearance or plea herein, or by virtue of which a legal and valid judgment could be authorized or entered against it.

Wherefore, said defendant prays that the Court take no further cognizance of this case as against it, and that it may be discharged forthwith.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Louisiana Western Railway Company.*

10 II.

And in the event the Court shall have disregarded or overruled the affidavit and statement of C. W. Sedgwick, filed herein, with reference to the defect of service on this defendant, and only in such event and after excepting to such ruling and action of the Court, the said

Louisiana Western Railway Company now under protest appears herein for the purpose of excepting and pleading to the jurisdiction of this Honorable Court, as follows, to-wit

"Said defendant shows to the court that, as appears on the face of plaintiff's petition herein, the cause of action, if any, the plaintiffs have, arose from acts and injuries occurring not within the limits of the State of Texas, but entirely within the limits and boundaries of the State of Louisiana; and that the plaintiffs will in no event be entitled to recover or to have their recoveries, if any, measured except and unless under and according to the laws of the State of Louisiana as they existed at the time of said alleged occurrences. And this defendant further shows and submits to the court that the laws of Louisiana, applicable to the alleged facts and occurrences of which the plaintiffs complain, and under which they have to recover, if at all, and according to which the defenses to said action would have to be made, and the measures of their recovery, if any, would have to be determined, are utterly different and dissimilar from the laws of Texas that would be applicable to any action accruing from a similar occurrence within the limits of the State of Texas; and that such inconsistency and dissimilarities between said laws of the two states of Louisiana and Texas are so pronounced and radical, that the courts of this state, in the exercise of substantial justice and in comity and in accordance with the statutes and the laws and public policies of this state, cannot legally or properly undertake to try this case and administer the laws of the State of Louisiana applicable thereto; and defendant avers that it is informed and believes and upon such information and belief so charges that said dissimi-
11 larities and inconsistencies, aside from many other, consist, and did at the time of the injuries and since, consist of the following features and difference in particular, to-wit:

(*a*) That at the time that the action alleged in plaintiffs' petition arose and accrued in the State of Louisiana, and the laws thereof became applicable thereto in regard to the right and form of action, the parties and the remedy and measure of damages, the laws prevailing in the State of Texas on each side of said subjects and matters were and now are distinctly and radically different from and inconsistent with the said laws of Louisiana; that said laws of Louisiana provided, authorized and entertained no joint action in favor of the surviving parents and no distribution among them of the sum awarded by the verdict and according to the discretion of the jury in a suit for the death of a child, as authorized by the laws of the State of Texas; that the laws of the State of Louisiana in cases in which damages were allowed to parents for injuries resulting in the death of a child included in and as part of such damages compensation for their wounded feelings and affections, caused by the death of the child, and for the deprivation of the pleasure and comfort of its society, while the laws of the State of Texas allowed in such actions no compensation for wounded feelings or affections, nor for the loss of the comfort and pleasure of the society of the deceased.

(*b*) That at time of the occurrence in the State of Louisiana complained of by plaintiffs in their petition herein, the laws of

Louisiana, with reference to the doctrine of the negligence of fellow servants as a matter of defense to the Louisiana Western Railway Company, were and have remained and still are totally at variance with the laws of the State of Texas at that time and at the present time, so that while the negligence of any of the deceased's fellow servants contributing to his alleged injuries and death would have constituted, according to the laws of the State of Louisiana,
12 when plead and proven, as this defendant proposes to do if required to plead, an available defense, and would exempt defendant from liability in this action; yet, according to the laws of the State of Texas, applicable to such injuries occurring within its limits, such defense as the negligence of a fellow servant would not avail as a bar to recovery.

(*c*) That the Louisiana Western Railway Company, was, and is, a corporation created by Special Act of the Legislature, known as Act No. 21 of the Acts of the General Assembly of the State of Louisiana for the year 1878, approved March 30, 1878, and said charter or Special Act declares and provides that the company shall not be responsible for the death or personal injury of any employé by any act of negligence on the part of the company, its officers or employés. The portion of said Act referred to reads substantially as follows, to-wit:

"That said company, its officers or employés, shall not be liable in any sum whatsoever, of damages or cost, in any action brought by any party against it, or them, or any or either of them, for any injury to the person or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all
13 such free passengers shall travel, and all such employees shall labor and render service upon said railroad, and upon all other railroads and transportation lines occupied and operated by said Company, at their own risk as to personal injury or loss of life or loss or detention of, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers, or employees, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

That by said Act of Legislature, the assumption of risk by the deceased, Gross, as an employee, and exemption from responsibility on the part of the defendant, Louisiana Western Railway Company, for acts of alleged negligence of a fellow servant or any other servant

or employee, was largely extended beyond what it was at common law, and that this became a matter of contract between the said defendant and the State of Louisiana, and a contract to which the deceased, Gross, by virtue of his employment and service became a party, and that the laws of the State of Louisiana under said charter and said contract, would protect and exempt the defendant from liability by virtue thereof; but that the provisions of said charter and said Special Act of the Legislature above set forth were not, when enacted, nor since nor at the present time, in accordance with the laws or policies of the State of Texas, nor would or could the Courts of the State of Texas in a spirit of comity or in line with the spirit of their laws or public policies, undertake to administer and apply said Special Act and charter so enacted and adopted by the State of Louisiana, as a special defense and immunity to the defendant in this case.

(*d*) That at the time of the occurrences in the State of Louisiana complained of by plaintiffs in their petition herein, and since said date, and at the present time the laws of the State of Louisiana, and the laws and practices of the Courts of the State of Texas, were essentially different and conflicting in reference to the power
14 and control of the trial and appellate judges over the findings and verdicts of juries, and with reference to the number of verdicts that might be set aside and new trials granted, and with reference to the number of jurors required to concur in order to return a verdict; that while in the state of Louisiana and according to its laws and rules of practices, as the same have existed and now prevail, the concurrence of nine members of the petit jury is sufficient for the return of a verdict, and there is no limit to the power and discretion of the judge to set aside such verdict when not in accord with his views, while under and according to the laws and rules of practice of the state of Texas the trial and appellate judge is not authorized to set aside a verdict unless he finds it against the preponderance of the evidence to such extent as to show manifest injustice, and the concurrence of the entire jury is essential to the finding and return of a verdict.

Wherefore, the defendant, Louisiana Western Railway Company, prays that this Court decline to take jurisdiction of this case, and that this defendant may be discharged with its costs.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Defendant Louisiana Western Railway Company.*

III.

And in the event that the Court should require the defendant, Louisiana Western Railway Company to appear and defend in this cause, and after excepting to such ruling; and in the event that the Court should overrule said defendant's exceptions and pleas to the jurisdiction of this Court hereinbefore set out, and after excepting to such rulings of the Court;—then and in that event, the defendant, Louisiana Western Railway Company demurs generally to the plaintiffs' petition herein, and shows to the Court, that the matters in said

petition alleged, in manner and form as therein set forth, are
15 not sufficient at law to entitle the plaintiffs to any relief whatsoever, and of this it prays the judgment of the Court.

IV.

And for further and special demurrer herein, if need be, the said defendant, Louisiana Western Railway Company, avers that the plaintiffs' petition herein shows upon its face that the alleged acts and injuries and damages complained of, occurred not in the State of Texas, but entirely within the State of Louisiana, and accordingly the allegations of plaintiffs' petition taken altogether are not sufficient in law to constitute a cause of action, or entitle plaintiffs to the relief sought, or any relief whatsoever, and of this the said defendant prays the judgment of the Court, and that it may go hence without day.

IV*a*.

And for further and special demurrer to that portion and paragraph of plaintiffs' First amended Original Petition filed herein May 19th, 1908, and to the context thereof, which reads as follows, to-wit; "Plaintiffs further represent that by the statute law of the state of Louisiana they are given a right of action against defendants and each of them, for the damages sustained by them by the death of their said son, caused by their negligence aforesaid, which statute is similar to the statute of this state giving parents a right of action for damages for the death of their son as a result of negligence"; the defendant avers that by such allegations and by the context thereof, the plaintiffs have departed from their original pleading herein, as set forth in their original petition on file, which is referred to and made a part hereof, and that for the first time by said allegations the plaintiffs seek and declare upon and assert a cause of action existing to them by virtue of a certain statute of the state of Louisiana, and that such alleged cause of action is set forth and sued upon by the filing of said amended petition May 19th, 1908, a date more than two years from and after the occurrence of said acci-
dent and death and the accrual of said cause of action (if any
16 plaintiffs have); and this defendant here now specially pleads in this connection, and by way of demurrer, the statute of limitation of the state of Texas of two years, in bar of such right and cause of action (if any) accruing and existing to the plaintiffs by virtue of the aforesaid statute of Louisiana and by virtue of the aforesaid allegations in said First Amended Original Petition.

And of this special demurrer this defendant prays judgment of the court and that said allegations be stricken out and held for naught.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Louisiana Western Railway Company.*

V.

And for plea an- answer in this behalf, if need be, and after excepting to the rulings of the Court, if they should be adverse to the

protest and pleas and exceptions hereinbefore set forth, the defendant, Louisiana Western Railway Company, denies all and singular the averments in plaintiffs' petition contained, and of this demanding strict proof, puts itself upon the country.

## VI.

And for further plea and answer in this behalf, if need be, the defendant, Louisiana Western Railway Company avers that if it were guilty of negligence in any particular, as alleged by plaintiffs, which is not admitted but expressly denied; nevertheless, that the plaintiffs are not entitled to recover from it, for the reason that the deceased, Corley Gross, directly contributed to his own injury and death by his negligence in this, that while operating and assisting to operate the locomotive, with defendant's passenger train, upon its railway track, and when he knew, or by the exercise of ordinary care would have known, that stock were, or were liable to be, on or near said track, he ran said locomotive and train at an excessive and rapid rate of speed, and took no precaution to look out for animals or other obstructions on or near said track, and took no steps to caution
17 the engineer or admonish him of the stock on the track, and made no effort to have the speed of the train checked, so as to avoid the accident and injury.

Wherefore, said defendant avers that the plaintiffs are not entitled to recover, and for this it puts itself upon the country.

## VII.

And for further plea and answer in this behalf, if need be, the defendant, Louisiana Western Railway Company avers that in so far as the deceased came to his death as the result of any negligence except his own, that said further negligence, if any, was that of his fellow-servant the engineer, who at the time was upon the train and the locomotive with him, and who knew, or by the exercise of ordinary care would have known that stock were on or likely to be on or near said track, and who by the use of ordinary care could have discovered the danger in time to have brought the said locomotive and train under control, and have stopped the same, thereby avoiding the alleged injuries; notwithstanding which he, the said engineer, took no precaution to look out ahead of said train and took no precaution to keep said train under control or to stop the same, and thus avoid the accident and injury complained of.

Wherefore the said defendant specially pleading the law of the State of Louisiana, as then and there existed and applied to the conduct of said locomotive engineer, avers that it is not liable to plaintiffs in said cause and of this it puts itself upon the country.

## VIII.

And said defendant avers, that it is not liable to plaintiffs in this case, for the reason that the deceased Corley Gross came to his death as the result of risks and dangers that were ordinarily incident to the service that he was engaged to perform for defendant in the

State of Louisiana, and as a result of risks and dangers which were open and obvious to him, and which he knew, or by the exercise of ordinary care in the performance of his duties, would and must have known; that the said plaintiff had voluntarily entered
18 the service of the said defendant as a locomotive fireman, and had remained therein with full knowledge of the manner in which its railroad tracks were enclosed, and with full knowledge of the existence of gates at various places in enclosures, and which were demanded and used by private land owners, and that deceased knew, or by the exercise of ordinary care in the performance of his duties must have known, that sometimes stock would pass through said gates and onto or near the track, without fault on the part of this defendant; and thus deceased's injuries resulted from the ordinary and known risks as aforesaid, and plaintiffs are entitled to recover nothing herein, and of this said defendant puts itself upon the country.

## IX.

And for further plea and answer in this behalf, if need be this defendant, the Louisiana Western Railway Company avers that by virtue of a Special Act of the Legislature of the State of Louisiana, known as Act No. 21 of the acts of the General Assembly of the State of Louisiana for the year 1878, approved, March 30th, 1878, which created the defendant and gave it power and existence as a corporation, it was provided that said defendant company should not be responsible for the death or personal injury of any employee while at work in its service, by any accident or alleged negligence on the part of the company, its officers or employees, and that by such legislation and by the acceptance thereof on the part of defendant as a charter for its existence and operation, the defendant's immunity and release from liability for the death or personal injury of employees in its service became a vested right and matter of contract, and that the deceased, *W. Miller* by entering into the employment of said defendant and voluntarily remaining in its service in view of its corporate existence, privileges and immunities, became a party to said contract and assumed the risk of the injuries which ensued, and defendant is in no manner liable therefor to plaintiffs. This defendant further avers that the statute of
19 Louisiana if any there be as alleged by plaintiffs in their first amended original petition creating or attempting to create in them a cause of action for damages growing out of the death of Corley Gross against this defendant in derrogation of said charter contract would be and is void as impairing the obligation of such contract, and is in violation of the constitution of the United States of America. Said Special Act in that portion of it here plead, reads as follows: "That said Company, its officers or employees, shall not be liable in any sum whatsoever, of damages or cost, in any action brought by any party against it, or them, or any or either of them, for any injury to the person, or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or em-

ployees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel and all such employees shall labor and render service, upon all other railroads and transportation lines occupied and operated by said company, at their own risk as to personal injury or loss of life or loss or detention of, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers, or employees and the said Company shall not be subject to any liability to any party for any such personal injury or loss of life."

And the said defendant, Louisiana Western Railway Company, here pleads said Special Act, and the acceptance thereof, and employment thereunder by deceased in bar of this action.

## X.

And for further plea in bar of this action, the said defendant avers that plaintiffs should not be permitted to maintain this suit or to recover herein against this defendant, for the reason that the alleged accident and death occurred not in the State of Texas, but entirely within the State of Louisiana, and that the laws of the State of Louisiana *and that the laws of the State of Louisiana* which applied to the right of action, if any, and to the remedy and form of action and parties and measures of damages, if any, as well as to the matters of defense, are inconsistent with the laws of the State of Texas on such subjects, and especially with regard to the nature and extent of the rights of action, if any, and the remedies and the measures of damages, and with reference to the power and control of the trial and appellate judges over the findings and verdicts of juries and the number of verdicts that might be set aside and new trials granted and the number of jurors required to concur in order to return a verdict, and with reference to the doctrine of fellow servants and the effects of negligence of fellow servants as a defense, all of which conflicts and differences are more fully set forth in the plea in abatement embraced in Section II of this answer, and with reference to the exemption of the defendant from liability by virtue of the provisions of the Special Act of the General Assembly of the State of Louisiana for the year, 1878, being entitled Act. No. 21, which is quoted in the last above paragraph No. IX of this answer; all of which matters are more particularly set forth by way of exception and plea in section II of this answer, and as therein stated are hereby referred to and made part hereof and are plead in bar of this action.

Wherefore, the said defendant avers that it would not be proper

or just or practicable or according to the comity between two states of the Union for the Courts of Texas to exercise jurisdiction for the trial of this cause on its merits and attempt to render judg-
21 ment against this defendant by administering the laws of the State of Louisiana.

The said defendant, having fully answered, prays that plaintiff be adjudged to take nothing by this suit, and that it may go hence without day and recover its costs.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Defendant Louisiana Western Railway Company.*

STATE OF TEXAS,
*County of Harris:*

Before me, the undersigned authority, on this day personally appeared A. L. Jackson, who having been duly sworn stated upon his oath that he is one of the attorneys for the defendant Louisiana Western Railway Company, and as such is authorized to make this affidavit; that he has read over and is familiar with the allegations set up in the plea to the jurisdiction and in abatement, as contained in section II on pages 1 to 4 of the above and foregoing answer, and that the allegations of fact therein set forth are true within the knowledge of affiant, except in so far as they are expressly stated therein upon information and belief, and that in so far as they are stated therein upon information and belief affiant believes them to be true.

(Signed) A. L. JACKSON.

Sworn to and subscribed before me this the 1st day of April, A. D. 1908.

[SEAL.] (Signed) RUTH E. ADAMSON,
*Notary Public, Harris County, Texas.*

## XI.

And for further plea and answer in this behalf, and in bar of plaintiffs' action herein, the defendant avers that the accident
22 and injury and the death of Corley Gross occurred, as alleged and set forth in plaintiffs' petition, on or about June 1st, 1905, in the state of Louisiana; that the plaintiffs have filed herein their First Amended Original Petition, May 19th, 1908, in which they make the following allegation for the first time in this cause, to-wit:

"Plaintiffs further represent that by the statute law of the state of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them by the death of their said son, caused by their negligence as aforesaid, which statute is similar to the statute of this state giving parents a right of action for damages for the death of their son as a result of negligence."

Now this defendant avers that by such allegations and by the

context thereof, the plaintiffs have departed from their original pleading herein, and for the first time seek to declare upon and assert a cause of action existing to them by virtue of a certain statute of the State of Louisiana; and that such alleged cause of action is set forth and sued upon by the filing of said amended petition May 19th, 1908, which is more than two years from and after the occurrence of said accident and death, and the accrual of said cause of action (if any plaintiffs have), and this defendant here specially pleads the statute of limitation of the State of Texas of two years, in bar of such right and cause of action (if any) accruing and existing to the plaintiffs by virtue of the aforesaid statute of Louisiana and by virtue of the allegations made in connection therewith in said First Amended Original Petition; and this defendant further specially pleads against said cause of action so asserted (if any) the statutes and laws of Louisiana, by virtue of which defendant alleges the said cause of action (if any) is barred by limitation and prescription within one year from the date of the accrual of such cause of action (if any); and of this defendant puts itself upon the country.

23

XII.

And for further plea and answer in this behalf, and in bar of the plaintiffs' action as set forth and asserted in their First Amended Original Petition, filed in this cause May 19th, 1908, this defendant avers that whereas the accident and injury and the death of Corley Gross occurred, as alleged in plaintiffs' petition, on or about June 1st, A. D. 1905, yet several of the grounds and causes of action upon which plaintiffs now declare, are set forth as causes and basis of action for the first time in plaintiffs' said amended original petition, filed May 19th, 1908, more than two years from and after the time of said occurrences and the accrual of plaintiffs' cause of action (if any they have), and this defendant specially avers that the plaintiffs, in and by their said amended petition, have departed from their original and former pleading and have set up new and additional causes of action against this defendant in and by virtue of each of the following portions and passages thereof, to-wit:

(1) That portion of paragraph "second" of section VI of said amended original petition, which reads as follows: "that defendants and their said servants and agents charged with a duty in that regard knew of their (the cattle) presence; within the said fences long enough to have notified the engineer and conductor in charge of the said train of their presence within the said enclosure, and that had they been thus notified they and said deceased could and would have been on the look-out for said cattle and have avoided striking the same or any one of the same, or in any event have so regulated the speed of the train as to prevent a derailment.

(2) Paragraph "third" of said section VI of said First Amended Original Petition, which reads as follows "That the animal struck by the said engine, causing the derailment of the engine, as
24 aforesaid, had been previously struck by another of defendants' engines from seven to ten hours before and crippled,

and that those of defendants' servants and employees in charge of the said engine and cars left the said animal in a wounded and disabled condition by the side of the track, and the said animal scrambled back upon the track, where it remained in its wounded condition until struck, as aforesaid, and that the said animal in the condition in which it was left beside the track, would probably work its way onto the track and become a dangerous obstruction to trains running thereon, was a result that a person of ordinary prudence would have foreseen as likely to occur under the circumstances and have made provision against, and was a result the said employés, in the exercise of ordinary care, should have foreseen under the circumstances and have made provision against."

(3) Paragraph "fifth" of section VI. of said First Amended Original Petition, which reads as follows, to-wit: "That defendants had a written or printed rule or bulletin order promulgated by an- in the name of the defendant, Louisiana Western Railway Company, making it the duty of all employés, without regard to the dep- t- ment in which they served, to report obstructions of any kind to the superintendent of the said railway and when possible to the nearest section or bridge foreman thereon, and defined as an obstruction, anything that would interfere with the safe passage of trains at full speed, and making it the duty of such foreman to turn out promptly with all their men and remove such obstructions whenever notified by trainmen or others, and this too, even though the obstruction was not on the section of the foreman receiving the notice; that this was the method adopted by defendants to perform the obligation they were under to their employés to insure to them a reasonably safe track for the running of the trains they were engaged in operating; that certain employés of defendants in charge of another engine and train some seven hours before the said de- railment, discovered the presence of a number of cattle, including the one struck by the said engine, within the right of wa- 25 fences at and near the place of said derailment; that said employés well knew of the existence of said rule or bulletin order and knew that the cattle were an obstruction within the meaning of the said rule or bulletin order, and their duty to report th- yet, notwithstanding, they wholly failed to notify the tendent of the said Louisiana Western Railway Company section foreman, which they could have done in ample ti- said cattle to have been removed and the derailment thus Or if the said rule did not apply as alleged by plaintiffs, then d- ant had no rule or regulation defining the duty of its employés with respect to cattle that should enter through the right of way fence upon the right of way and upon the track, whereas the reasonable safety of its train employés required that it should have and enforce rules or regulations for the protection of its employés in its train service against risks of injury arising from collision of its trains with cattle or other animals upon its right of way and track under such circumstances by casting upon certain employés the duty of removing such animals from the track and right of way, and of giv-

ing notice of their presence thereon to employés in its train service who might be exposed to danger or injury thereby, and defendant is notified to produce on the trial of this cause its written and printed rules to the end that it may be made to appear that defendant had no such rule or regulation in force at the time of the death of said Gross."

(4) Paragraph "sixth" of section VI of said First Amended Original Petition, which reads as follows, to-wit: "That the pilot *of* "cow catcher" at the front of the said engine, and which is an appliance intended for lifting and throwing animals and other objects from the track and thus preventing derailments, was constructed or adjusted to the front of the engine in such manner as that it turned up at the point and was too high above the track and as thus constructed or adjusted was an unsafe and dangerous appliance for the use for which it was intended; and the said pilot or cow catcher was further rendered an unsafe appliance for the purpose in-
26 tended, in that, the iron bar attached to the top of the pilot for use in coupling onto cars, was made to lie, when not in use, upon the front of the pilot and to extend from the top at about the middle down to or beyond the point of the pilot, whereas, provision should have been made by defendants for the said bar to be drawn back toward the boiler head and there secured, which was not done; and that the said unsafe and dangerous condition of the pilot or cow catcher, when the same struck the said animal, which was lying down on the track held the said animal upon the track instead of raising and throwing the same from the track as would have been the case had the said pilot been properly constructed or adjusted, or the said bar had been secured back against the boiler head and thus causing the said animal to be run upon and over by the said engine ..d the said engine and cars to be derailed." And this defendant yers that said allegations above set forth and quoted, and each of .. paragraphs thereof, and the right and causes of action (if any) .own thereby, are made the basis for suit and action for the first time by and through the said First Amended Original Petition, filed herein on the 19th day of May, 1908, the plaintiffs thereby .. commenced suit and action thereon more than two years occurrence of the alleged accident, injury and death, and accrual of the rights of action (if any) to plaintiffs, based ..d against each and all of said allegations and paragraphs ..ted, and the rights and causes of action (if any) thereby .. this defendant specially pleads the statute of limitation of ..wo years of the state of Texas, as a perpetual bar thereto; and in ..is connection further specially pleads the laws and statutes of the state of Louisiana, under and by virtue of which defendant alleges that such rights and causes of action (if any) are barred and prescribed within the period of one year from the date of their accrual; and of this said defendant prays the judgment of the court and puts ..its ..upon the country.

27 And now having fully answered, this defendant prays that plaintiffs be adjudged to take nothing by this suit, and that it may go hence without day and recover its costs.

(Signed) LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Defendant Louisiana Western Railway Company.*

Filed Oct. 3rd, 1908. Henry Albrecht, C. D. C. H. C. By A. J. Schweikart, Dep-ty.

*First Amended Original Answer of Defendant Texas and New Orleans Railroad Co.*

Filed Oct. 3, '08.

In the District Court of Harris County, Texas, 55th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Now comes the defendant, Texas and New Orleans Railroad Company, in the above entitled and numbered cause, and with leave of the Court first had and obtained, files this its First Amended Original Answer in lieu of its original answer heretofore filed in this cause, and for amendment says:

I.

For exception and plea to the jurisdiction of this Court, said defendant adopts and urges the pleas and exceptions set up in Sec. II of the Original Answer of its co-defendant, the Louisiana Western Railway Company, on file herein; and wherefore this defendant prays that this Court decline to take jurisdiction of this case, and that this defendant may be discharged with its costs.

II.

28 And in the event that the court should retain jurisdiction of this cause and require this defendant to appear and further plead herein, then it demurs generally to the plaintiffs' petition and avers that the allegations in said petition, in manner and form as set forth therein, are not sufficient at law to entitle the plaintiffs to any relief whatsoever; and of this it prays the judgment of the court.

III.

And for further and special demurrer herein, the said defendant, Texas & New Orleans Railroad Company, avers that the plaintiffs'

petition herein shows upon its face that the alleged acts and injuries and damages complained of occurred not in the State of Texas, but entirely within the State of Louisiana, and accordingly the allegations in plaintiffs' petition are not sufficient in law to constitute a cause of action or to entitle plaintiffs to recover nor to any relief whatsoever, and of this said defendant prays the judgment of the court.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Defendant Texas & New Orleans Railroad Company.*

III*a*.

And for further special demurrer herein the said defendant, Texas & New Orleans Railroad Company, adopts and hereby urges on its own behalf the special demurrer presented and urged by its co-defendant the Louisiana Western Railway Company, in section IV-A of its original answer on file in this cause, and of this prays the judgment of the court.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Defendant Texas & New Orleans Railroad Company.*

IV.

And for plea and answer in this behalf, if need be, the defendant, Texas & New Orleans Railroad Company, avers that it is not guilty of the wrongs and negligence charged against it, and it
29 denies, all and singular, the averments in plaintiffs' petition contained, and of this demanding strict proof, puts itself upon the country.

V.

And for further plea and answer in this behalf, the said defendant, Texas & New Orleans Railroad Company, avers that the allegations in plaintiffs' petition to the effect that the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company and the Southern Pacific Company are partners in business, or were partners in business at the time of the alleged injury and death of the deceased, Corley Gross, are untrue, and this defendant here specially denies each and all of said allegations in the said petition to the effect that any such partnership existed at the time of said injury and death, or subsequent thereto, and this defendant is ready to verify.

VI.

And for further plea and answer in this behalf, the defendant, Texas & New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, Louisiana Western Railway Company, as fully set forth and contained in Sec. VI of the original Answer of its said co-defendant on file herein.

VII.

And for further plea in this behalf, the defendant, Texas & New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, Louisiana Western Railway Company, as the same is set forth and contained in Sec. VII of the Original Answer of its said co-defendant, on file herein.

VIII.

And for further plea and answer in this behalf, the defendant, Texas & New Orleans Railroad Company hereby adopts and urges the answer and plea of its co-defendant, Louisiana Western Railway Company, which is set forth and contained in Sec. VIII of the Original Answer of its said co-defendant, which is on file herein.

IX.

And for further plea and answer in this behalf, the defendant Texas & New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, Louisiana Western Railway Company, which is set forth and contained in Sec. IX of the Original Answer of its said co-defendant, which is on file herein.

30 X.

And for further plea and answer, the defendant, Texas & New Orleans Railroad Company, hereby adopts and urges the plea and answer of its co-defendant, The Louisiana Western Railway Company, which is set forth and contained in Sec. X of the Original Answer of the said co-defendant, which is on file herein.

Wherefore, this defendant having fully answered, prays that plaintiffs be adjudged to take nothing by this suit, and that it may go hence without day and recover its costs.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Defendant Texas & New Orleans Railroad Company.*

THE STATE OF TEXAS,
*County of Harris:*

Before the undersigned authority, on this day, personally appeared W. G. Van Vleck, who, after being by me duly sworn, deposes and says that he is Vice President of and Manager for the Texas & New Orleans Railroad Company, and that of his own knowledge the allegations contained in paragraph or Section V of the above and foregoing answer, denying the existence of a partnership relation between the Louisiana Western Railway Company and the Texas & New Orleans Railroad Company, are true.

(Signed) W. G. VAN VLECK.

Sworn to and subscribed before me, on this the 3rd day of April, A. D. 1908.

[SEAL.] JNO. H. McCLUNG,
*Notary Public, Harris County, Texas.*

XI.

And for further plea and answer in this behalf, the defendant Texas & New Orleans Railroad Company hereby adopts and urges the plea and answer of its co-defendant, the Louisiana Western Railway Company, which is set forth and contained in section
31 XI of the original answer of said co-defendant, which is on file herein, and of this puts itself upon the country.

XII.

And for further plea and answer in this behalf, the defendant Texas & New Orleans Railroad Company hereby adopts and urges the plea and answer of its co-defendant Louisiana Western Railway Company, which is set forth and contained in section XII of the original answer of its said co-defendant, which is on file herein.

Wherefore this defendant having fully answered prays that plaintiff be adjudged to take nothing by this suit, and that it may go hence without day and recover its costs.

LANE, JACKSON, KELLY & WOLTERS,
*Attorneys for Defendant Texas & New Orleans Railroad Company.*

Filed Oct. 3, 1908. Henry Albrecht, C. D. C. H. C., by A. J. Schweikart, Deputy.

*Order Overruling Plea to the Jurisdiction and in Abatement and General and Special Demurrers of Defendants.*

(Recorded in Vol. 18, page #325.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

On this the 30th day of January, 1909, in the above entitled and numbered cause came on to be heard the defendant Louisiana Western Railway Company's plea to the jurisdiction and in abatement, set forth and embraced in section II of its original answer filed in this cause October 3rd, 1908, said cause having heretofore been continued without prejudice to said plea, and the court, having heard said plea and the allegations thereof and having heard and considered the evidence introduced in support and in
32 connection therewith and argument thereon, doth find that said plea is not well taken and doth therefore consider and

order that the said plea by in all things overruled; to which ruling of the court the said defendant, Louisiana Western Railway Company, in open court duly excepts.

And at the same time came on to be heard the plea in abatement and to the jurisdiction of the defendant Texas & New Orleans Railroad Company, set forth in section I of its first amended original answer herein October 3rd, 1908, and the plea in abatement and to the jurisdiction of the defendant Southern Pacific Company, embraced in section II of its original answer, filed herein October 3rd, 1908, and the court, having heard said pleas, together with the evidence introduced in support thereof and in connection therewith, doth find that the same are not well taken and they are accordingly overruled by the court;—to which rulings the said defendants, Texas & New Orleans Railroad Company and the Southern Pacific Company, in open court each duly except.

And thereafter upon the same day came on to be heard the general demurrer of the defendant Louisiana Western Railway Company, embraced in section III of its said original answer, and the general demurrer of the defendant Texas & New Orleans Railroad Company, embraced in section II of its said amended original answer, and the general demurrer of the defendant Southern Pacific Company, embraced in section II of its said answer and the court, having duly considered each of the said general demurrers, hereby overrules the same; to which rulings of the court the said defendants, respectively, and each of them, in open court duly except.

And thereafter and upon the same date came on to be heard the special demurrer of the defendant Louisiana Western Railway Company, embraced in section IV of its original answer, and the special demurrer of the defendant Texas & New Orleans Railroad Company, set forth in section III of its said amended answer, and the
33 special demurrer of the Southern Pacific Company, embraced in section IV of its said answer, and the court, having heard and duly considered each of said special demurrers, doth overrule each of them;—to which rulings of the court the said defendants, and each of them, duly except.

And thereupon, on the same date, came on to be heard the special demurrer of the defendant Louisiana Western Railway Company, set forth and embraced in section IV-A of its said original answer, and the special demurrer of the defendant Texas & New Orleans Railroad Company, set forth in section III-A of its said amended original answer, and the special demurrer of the defendant Southern Pacific Company, set forth and embraced in section IV-A of its said amended answer, and the court, having heard and considered each and all of said special demurrers, finds the same are not well taken and overrules the same; to which rulings of the court each and all of said defendants, respectively, in open court duly except.

Recorded in Vol. 18, page 325 of the District Court Minutes of Harris County, Texas, for the 11th Judicial District.

*Final Judgment.*

(Recorded in Vol. 18, page #327.)

#39491.

FELIX & THERESA GROSS et al.
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

And now on this the 30th day of January, A. D. 1909, this cause was called for trial, and thereupon came the plaintiffs in person and by their attorneys and the defendants by their attorneys, and having heretofore dismissed as to the Southern Pacific Company, all parties announced ready for trial; the defendants' pleas in abatement and general demurrer having already been disposed on this day; and neither party demanding a jury the matters of fact as well as of law were submitted to the court, and the court having heard
34 the pleadings, evidence and arguments of counsel is of the opinion that that law is with the plaintiffs, and finds for the plaintiffs against both defendants, and assesses their damages at the sum of six thousand ($6,000.00) dollars, and apportions the same among the plaintiffs as follows:

| | |
|---|---|
| Felix Gross | $3000.00 |
| Theresa Gross | 3000.00 |

It is therefore considered, adjudged and ordered by the court that the plaintiffs Felix Gross and Theresa Gross do have and recover of the defendants the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company the said sum of six thousand ($6,000.00) dollars, apportioned among them as above stated, together with all costs incurred or expended by them in this behalf for all which they may have their execution. This judgment shall bear six (6) per cent interest per annum from date.

To the foregoing judgment and the courts' conclusions of fact and law, and every portion thereof the defendants in open court excepted, and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District, sitting at Galveston.

Upon application of the parties a period of twenty days from and after the adjournment of the present term of this court is allowed in which to prepare and file a statement of facts and bills of exception.

Recorded Vol. 18, page 327 of the Minutes of the District Court for the 11th Judicial District of Texas.

*Conclusions of Fact and Law.*

(Filed Jan. 30th, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD CO. et al.

At the request of counsel for defendants the Court makes and files the following conclusions of fact and law:

35 *Conclusions of Fact and Law.*

I.

(1) That the plaintiff Felix Gross is the surviving father and the plaintiff Theresa Gross is the surviving mother of Corley Gross, deceased, and the said plaintiffs and deceased, at the time of his death, on to-wit: June 1st, A.D. 1905, were citizens of the State of Texas and resided in Harris County, in said State; that the defendants, Texas & New Orleans Railroad Company, hereinafter referred to as the "Texas Company" was on said date a railway corporation duly incorporated under the laws of the State of Texas, and owned and for a long time prior thereto had owned a line of railway extending from Houston in Harris County to the State line between Texas and Louisiana; that the defendant Louisiana Western Railway Company, hereinafter referred to as the "Louisiana Company" was on said date a railway corporation duly incorporated under the laws of the State of Louisiana and owned and for a long time prior thereto had owned a line of railway extending from said State line opposite Echo, to Lafayette in the State of Louisiana, and that both said defendants on said date and for a long time prior thereto were jointly engaged in the business of operating the said railways as one continuous line from Houston in said Harris County, Texas to Lafayette in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock and employees of the other as the business or convenience required, and each hired for and discharged employees in the said joint business and the employees hired by one were required to perform and did perform service — on the railway of the other; that such employees made continuous runs on trains operated from Houston to Lafayette, and vice versa, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston and Lafayette over said railways as a continuous route and were partners in such business, sharing in the profits and losses thereof.

(2) That the railway of the "Louisiana Company" ran
36 through a country in which there were numbers of cattle and the said Company fenced its right of way for the purpose of excluding cattle therefrom and that the fences were effectual to ex-

clude cattle from the right of way when ordinary care was used to keep them in proper repair and when such care was used to keep the gates closed; and the employees operating trains over the said railway relied upon the Company to keep the fence in repair and the gates closed to the end that they might not be exposed to the peril of injury or death by the derailment of engines and cars coming in contact with cattle which would otherwise enter upon the right of way and track.

(3) That on, to-wit, June 1st, A. D., 1905, the said deceased Corley Gross, was in the employ of defendants in the capacity of fireman of locomotives drawing passenger trains operated by defendants over their said railways between Houston in said Harris County, Texas and Lafayette, Louisiana, and was on said date fireman of a locomotive drawing one of the defendants' passenger trains running from Houston to Lafayette over said railway, and that upon the train getting near a station known as Sulphur in Louisiana, in the night time, the locomotive struck an animal of the cow species and was thereby, together with a number of cars, derailed, and the said Gross then and there injured, so that as a result thereof, he died and plaintiffs were actually damaged by his death in the sum hereinafter stated.

(4) I find that some hours previous to the derailment of Gross' locomotive that another of defendants' trains had struck and killed an animal of the cow species, near the place of the derailment; and the carcass was allowed to lie upon the right of way within a short distance of a gate in the right of way fence, and that several hours prior to the derailment a number of cattle entered the right of way through the said gate and were seen by employees of defendants in charge of one of defendants' East bound trains, gathered about the dead one holding a "ceremony" as expressed by one of the witnesses; that the said cattle were probably attracted upon the
37 right of way by the dead one; and I find that defendants knew or would have known by the exercise of ordinary care of the presence of the dead animal upon the right of way and knew or would have known by the exercise of such care, that if the gate was open and that cattle would probably be attracted therein by the dead one or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified the conductor and engineer of the train of that fact, and in time to have had the said cattle removed from the right of way, and I find that it was the duty of defendants and the section men upon the section upon which the said cattle were, to have removed said cattle or failing to do so to notify said conductor and engineer of the presence of said cattle upon the right of way and that they could have notified them and in that case they and said Gross could have been upon the lookout for said cattle and probably have avoided striking the one which they did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right of way under the circumstances and in failing to remove them from the right of way before

the accident, or in not giving the conductor and engineer of the train notice of their presence upon the right of way and that such negligence was the proximate cause of the death of Gross.

(5) I find that there is a substantial similarity between the laws of Louisiana and the laws of Texas giving right of action for injuries resulting in death, and that under the law of Louisiana that Gross was not a fellow servant of those whose negligence caused his death, and that he did not assume the risk of injury which resulted in his death, and was in the exercise of ordinary care.

38 II.

*Conclusions of Law.*

In view of the foregoing findings of fact, I conclude that under the law of Louisiana as well as under the law of Texas the plaintiffs are entitled to a judgment against both defendants, and I so adjudge, and assess their damages in the sum of six thousand ($6,000.00) dollars, which I apportion between them as follows:

| | |
|---|---|
| Felix Gross | $3,000.00 |
| Theresa Gross | 3,000.00 |

(Signed) CHAS. E. ASHE, *Judge.*

Filed Jan. 30th, 1909. Henry Albrecht C. D. H. C., by Frank H. Meyer, Deputy.

*Defendants' Bill of Exception No. 1.*

(Filed Feb'y 16th, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: that on the 30th day of January, 1909, there came on to be heard and considered, in the above entitled and numbered cause, the defendant Louisiana Western Railway Company's plea to the jurisdiction and in abatement, embraced in Section II of its original answer on file, which reads as follows, to-wit:

"And in the event the Court shall have disregarded or overruled the affidavit and statement of C. W. Sedgwick, filed herein, with reference to the defect of service on this defendant, and only in such event and after excepting to such ruling and action of the Court,

the said Louisiana Western Railway Company now under
39 protest appears herein for the purpose of excepting and pleading to the jurisdiction of this Honorable Court, as follows, to-wit:

Said defendant shows to the Court that, as appears on the face of plaintiffs' petition herein, the cause of action, if any the plaintiffs have, arose from acts and injuries occurring not within the limits of the State of Texas, but entirely within the limits and boundaries of the State of Louisiana; and that the plaintiffs will in no event be entitled to recover or to have their recoveries, if any, measured except and unless under and according to the laws of the State of Louisiana as they existed at the time of said alleged occurrences. And this defendant further shows and submits to the Court that the laws of Louisiana applicable to the alleged facts and occurrences of which the plaintiffs complain, and under which they will have to recover, if at all, and according to which the defenses to said action would have to be made, and the measures of their recovery, if any, would have to be determined, are utterly different and dissimilar from the laws of Texas that would be applicable to any action accruing from a similar occurrence within the limits of the State of Texas; and that such inconsistency and dissimilarities between said laws of the two states of Louisiana and Texas are so pronounced and radical, that the Courts of this State, in the exercise of substantial justice and in comity and in accordance with the statute and the laws and public policies of this state, cannot legally or properly undertake to try this case and administer the laws of the State of Louisiana applicable thereto, and defendant avers that it is informed and believes and upon such information and belief so charges that said dissimilarities and inconsistencies, aside from many others, consist, and did at the time of the injuries and since, consist of the following features and differences in particular, to-wit:

(a) That at the time that the action alleged in plaintiff's petition arose and accrued in the State of Louisiana, and the laws thereof became applicable thereto in regard to the right and form of
40 action, the parties and the remedy and the measure of damages, the laws prevailing in the state of Texas on each of said subjects and matters were and now are distinctly and radically different from and inconsistent with the said laws of Louisiana; that said laws of Louisiana provided, authorized and entertained no joint action in favor of the surviving parents and no distribution among them of the sum awarded by the verdict and according to the discretion of the jury in a suit for the death of a child, as authorized by the laws of the state of Texas; that the laws of the state of Louisiana in cases in which damages were allowed to parents for injuries resulting in the death of a child included in and as part of such compensation for their wounded feelings and affections, caused by the death of the child, and for the deprivation of the pleasures and comfort of its society, while the laws of the state of Texas allowed in such actions no compensation for wounded feelings or affections, nor for the loss of the comfort and pleasure of the society of the deceased.

(*b*) That at the time of the occurrence in the State of Louisiana complained of by plaintiffs in their petition herein, the laws of Louisiana, with reference to the doctrine of the negligence of fellow servants as a matter — to the Louisiana Western Railway Company, were and have remained and still are totally at variance with the laws of the State of Texas at that time and at the present time, so that while the negligence of any of the deceased's fellow servants contributing to his alleged injuries and death would have constituted, according to the laws of the State of Louisiana, when plead and proven, as this defendant proposes to do, if required to plead, an available defense, and would exempt defendant from liability in this action; yet, according to the laws of the State of Texas, applicable to such injuries occurring within its limits, such defense as the negligence of a fellow servant would not avail as a bar to recovery.

41 (*c*) That the Louisiana Western Railway Company was, and is, a corporation created by Special Act of the Legislature known as Act No. 21 of the Acts of the General Assembly of the State of Louisiana for the year 1878, approved March 30, 1878, and said charter and Special Act declares and provides that the company shall not be responsible for the death or personal injury of any employé by any act of negligence on the part of the company, its officers, or employés. The portion of said Act referred to reads substantially as follows, to-wit:

"That said company, its officers or employees, shall not be liable in any sum whatsoever, *of* damages or costs, in any action brought by any party against it, or them, or any or either of them, for any injury to the person or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employees shall labor and render service upon said railroad, and upon all other railroads and transportation lines occupied and operated by said company, at their own risk as to personal injury or loss of life or loss or detention of, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers, or employees

42 and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

"That by said Act of Legislature, the assumption of risk by the deceased, Gross, as an employé, and exemption from responsibility on the part of the defendant, Louisiana Western Railway Company

for acts of alleged negligence of a fellow servant or any other servant or employee was largely extended beyond what it was at common law and that this became a matter of contract between the said defendant and the State of Louisiana, and a contract to which the deceased, Gross, by virtue of his employment and service became a party, and that the laws of the State of Louisiana under said charter and said contract, would protect and exempt the defendant from liability by virtue thereof; but that the provisions of said charter and said Special Act of the Legislature above set forth were not, when enacted, nor since nor at the present time, in accordance with the laws or policies of the State of Texas, nor would or could the Courts of the State of Texas, in a spirit of comity or in line with the spirit of their laws or public policies, undertake to administer and apply said Special Act and charter so enacted and adopted by the State of Louisiana, as a special defense and immunity to the defendant in this case.

(*d*) That at the time of the occurrence in the State of Louisiana complained of by plaintiffs in their petition herein, and since said date, and at the present time, the laws of the State of Louisiana and the laws and practices of the Courts of the State of Texas were essentially different and conflicting in reference to the power and control of the trial and appellate judges over the findings and verdicts of juries, and with reference to the number of verdicts that might be set aside and new trials granted, and with reference to the number of jurors required to concur in order to return a verdict: that while in the State of Louisiana and according to the laws
43 and rules of practice as the same have existed and now prevail, the concurrence of nine members of the petit jury is sufficient for the return of a verdict, and there is no limit to the power and discretion of the judge to set aside such verdict when not in accord with his views, while under and according to the laws and rules of practice of the State of Texas the trial and appellate judge is not authorized to set aside a verdict unless he finds it against the preponderance of the evidence to such extent as to show manifest injustice, and the concurrence of the entire jury is essential to the finding and return of a verdict.

Wherefore, the defendant, Louisiana Western Railway Company prays that this Court decline to take jurisdiction of this case, and that this defendant may be discharged with its costs."

And at the same time came on to be heard the similar plea to the jurisdiction and in abatement of the defendant Texas and New Orleans Railroad Company, as set forth and mentioned in section I of its First Amended Original Answer on file herein.

And it appearing to the Court that said cause had theretofore been continued without prejudice to said pleas and that it was opportune and proper that the same should be heard and considered, and the allegations of said pleas having been duly read by counsel in open Court, thereupon counsel for the respective defendants in support of said pleas offered and introduced the following evidence, to-wit:

First. Defendants offered and introduced the testimony of HENRY P. DART, by depositions taken in New Orleans, May 25th, 1908, reading as follows in question and answer form:

Interrogatory No. 1.

Please state your name, age, residence, occupation and profession

A. Henry Plauche Dart. I am fifty years old. New Orleans, La. Lawyer.

Interrogatory No. 2.

If in answer to the preceding interrogatory you have stated that you are an attorney and counselor at law, and are and have
44 been engaged in the practice of your profession in the state of Louisiana,—then please state the period during which you have practiced your profession in said state, and the extent of your experience in such practice.

A. I was admitted to the Bar of Louisiana in New Orleans in February, 1879, and I am still in active practice, being the senior member of the law firm of Dart & Kernan, with offices in the Liverpool London & Globe Building, New Orleans, La.

I have enjoyed for many years and still enjoy a large practice in every branch of litigation, appearing before all the State Courts, the Federal Courts and the Supreme Court of the United States. During my whole professional life I have been constantly engaged in personal injury cases and have prosecuted and defended many such actions.

Interrogatory No. 3.

Please state whether, by virtue of your knowledge of and experience with reference to the principles and rules you are qualified and able to state with substantial accuracy the status of the laws of said state on the subject of rights of action for personal injuries resulting in death (if any) existing or accruing to surviving relatives, on account of damages or losses to such relatives by reason of death; and whether you are familiar with and able to state with substantial accuracy, from your knowledge and experience, the laws in the State of Louisiana with reference to the measure and elements of damage (if any) allowed to surviving relatives in such cases, and with reference to the respective functions of the judges and juries in the trial of fact cases before juries, and the power and discretion of the trial or appellate judges to review, set aside, reform, alter, or remit judgments based upon the verdicts of juries.

A. I believe I am able and qualified by knowledge and experience to state with substantial accuracy the law and the practice in the Courts of Louisiana in such cases.

45 Interrogatory No. 4.

In the plaintiffs' petition in this case it is alleged, substantially that the plaintiffs, Felix Gross and Theresa Gross, husband and wife, are the surviving parents of Corley Gross, deceased, who on or about June 1st, 1905, was in the employment of the defendants as a locomotive fireman; and that while the locomotive which he was engaged and assisting to operate was drawing a passenger train through Calcasieu Parish, in the State of Lousiana, on the railway line of the Louisiana Western Railroad Company, at the usual speed, the locomotive encountered a beef, or other animal, lying on the track,

and the engine and several of the cars were thereby derailed and turned over, as result of which the said Corley Gross was scalded and burned to such extent that he thereafter in about two weeks died, etc. The plaintiffs claim and pray for damages in the sum of twenty-five thousand dollars.

Please state whether the laws of Louisiana afford any right of action for personal injuries resulting in death by the wrongful conduct of another, in the State of Louisiana, for the benefit of any surviving relative; and if yea, please state briefly the history of the law in the State of Louisiana on this subject, up to and including the present time.

—. "The law of Louisiana confers a right of action for personal injuries inflicted by the wrongful conduct of another. In case of death the action survives for one year, from the death, in favor of the minor children or widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either of them. This action does not survive in favor of any other relative. It has been decided, for instance, that grandparents are excluded from its benefits. The remedy thus afforded is statutory and appears in slightly different form in the earliest Code of Louisiana (See Digest of the Civil Laws, etc., published in 1808, Sec. II Art. 16 p. 320) and has been amended from time to time and
46 is now known as Article 2315 of the Revised Civil Code of Louisiana of 1870, which is the date of the last general revision of the Civil Code of Louisiana. This article has been amended by the Legislature of Louisiana since the date mentioned, the most recent amendment being that of 1884, so that the Article now reads as hereinafter set forth.

As I understand interrogatory Four the foregoing is the information wanted i. e. the origin and history of the right of action.

Interrogatory No. 5.

If in answer to the last preceding interrogatory you have stated that the right of action inquired about therein does exist and is recognized in the State of Louisiana, by virtue of a local statute or code, please give reference to the same and quote it at length, as part of your answer hereto.

A. The local statute which governs actions for personal injury is as stated in the answer to the last interrogatory. As it exists today the same will be found printed in Merrick's Annotated Edition of the Revised Civil Code of Louisiana as Article 2315, page 559, and it is in the following language.

Article 2315: Obligation to Repair Damage Caused by Wrongful Acts: Survivorship of Action:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother of either of them, for the space of one year from the death. The survivors above men-

tioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

Interrogatory No. 6.

If in answer to preceding interrogatories you have indicated the authority and basis (if any) upon which the courts in the
47 State of Louisiana recognize and award damages for injuries resulting in death inflicted through the fault of another person, then please state what were the rules of law obtaining in the State of Louisiana on the date of the alleged injury, with reference to the measure of damages and elements of damage allowed for such injuries to those entitled to the action.

And in this connection state:

(*a*) Whether the damages so allowed the surviving parents and the surviving wife and children, include compensation for the wounded feelings and affections of the survivors, or for deprivation of the society of the deceased; and in this connection make reference to any decisions or other authorities on this subject; and

(*b*) State whether the fact that a deceased child for whose death action was brought by the parents has passed its majority, is a circumstance to be considered by the Judge or Jury in connection with the measure or amount of damages that may be awarded; and in this connection refer to any decision or other authority that may be convenient.

A. The State Courts of Louisiana recognize and resort to the foregoing statute as the basis of authority for all cases involving actions or claims for personal injury. There is no law or authority for such an action in the Courts of Louisiana, other than the Article of the Civil Code aforesaid and the amendments thereto. The Civil Code however contains nine articles on the general subject, which in Louisiana goes by the title of "Offences & Quasi Offences," the Articles being 2315 (already cited) to 2324 (inclusive) which articles I append to this answer, omitting 2315, already quoted, in order that the entire statutory law on the subject matter shall be placed before you. Of course these articles have been the subject of judicial construction and interpretation for many years and the decisions are from my point of view, "law or authority," under the Code, and you will so understand my answer.

The Articles above mentioned are as follows: Article 2316:
48 Negligence, Imprudence, or Want of Skill: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

Article 2317: Liability for acts of others and things in our charge:

"We are responsible, not only for damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

Article 2318: Acts of Minors: The father, or after his decease, the mother are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.

The same responsibility attaches to the tutors of minors."

Article 2319: Acts of Insane Persons.

"The curators of insane persons are answerable for the damage occasioned by those under their care."

Article —: Acts of Servants, etc.

"Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed. Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases responsibility only attaches when the masters or employers, teachers and artisans might have prevented the act which caused the damage, and have not done it."

Article 2321: Animals: "The owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury, except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm
49 done, without being allowed to make the abandonment."

Article 2322: Building:

"The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

Article 2323: Estimating Damages: Negligence:

"The damage caused is not always estimated at the exact value of the thing destroyed or injured, it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."

Article 2324: Person assisting or encouraging Damage, Liable in Solido:

"He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act."

Before the adoption of the amendment of 1884, these statutes were construed as limiting the survivor's action to the right of action which the deceased would have had, had he survived the injury. Vredenburg vs. Behan, 33 La. An. 643.

After the passage of the Act of 1884 the Court declared that the Act created "an obligation by expressly declaring the existence of a liability where there was none before, and opens the way to a recov-

ery for its violation." Van Amberg vs. R. R. Co. 37 La. An. 652. Eichorn vs. R. R. Co. 112 La. 250; 36 S. R. 335.

Therefore as the law stood at the date of this accident and as it now stands the survivor may recover:

(1) The Damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death for his disfigurement, for the expenses of his illness. These are called heritable damages.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

On both propositions see Eichorn vs. R. R. Co. 114 La.
50 718 et seq. 38 S. R. 526: Payne vs. Lumber Company 117 La. 991: 42 — Rep. 475: Dobyns vs. R. R. 119 La. 82: 43 So. Rep. 934.

(3) To these elements the Court has now added recovery for mental suffering of the survivor. See Stewart vs. R. R. 112 La. 767: 36 So. Rep. 676 as applied in Graham vs. Telegraph Company 109 La. 1070, 34 So. Rep. 91: Parker vs. Lumber Co. 115 La. 463: 39 So. Rep. 445 and note the qualification in Brinkman vs. Oil Co. 118 La. 846: 43 So. Rep. 458.

(4) Vindictive or punitory damages are not permitted in actions for personal injury against a corporation: McGary vs. City 12 Rep. (La. Reports) 675: McFee vs. R. R. Co. 42 La. An. 790. Patterson vs. R. R. Co. 110 La. 797, 34 So. Rep. 782 and Parkerson case 115 La. 468.

(5) No action lies under the statute in favor of the surviving child who had reached the age of majority before the accident. Huberwald vs. R. R. Co., 50 La. An. 477: 23 So. Rep. 474. In Eichorn vs. New Orleans & Carrollton R. R. Co. 114 La. 712 38 So. Rep. 529-531 you will find that the child's right of action was recognized, where the child being a minor at the date of the accident had reached majority since then. The age of majority in Louisiana is 21 years. Where the action runs in favor of minors, the damages are apportioned according to their respective majorities. See Eichorn's case 114 La. at p. 726.

(6) Children, under the code of Louisiana, Article 229, "are bound to maintain their father and mother and other *descendants* who are in need," on the other hand the child under Article 216 of the Civil Code remains under the authority of his parents until his majority.

There is also further provision Articles 230-231, defining alimony as "what is necessary for the nourishment, lodging and support of the person who claims it."

In Myhan vs. Electric Co. 41 La. An. 969 the parents claimed for the death of a son of eighteen years. The Court referring to
51 his duty said: "The probability is that he was a robust young man, attentive to his duties and kind to his parents, he would have advanced in life and bettered his and their condition. In the course of years he would have accumulated earnings to some reason-

able extent, due regard had to his personal wants and necessities, etc."

This would indicate that the child over majority owes certain obligations to his parents. I do not think these are the same he would owe or that they could expect from a minor. Therefore I consider under our law that question six subsection (*b*) must be answered in the affirmative. In the Myhan case the Court allowed $2000.00 for the death, as a sum that would relieve the parents "for a while to some extent from the immediate consequences attending the severe injury inflicted of them."

The Supreme Court of Louisiana has decided that the restrictive clause of Article 2320 has been read out of the Article as the result of the Jurisprudence of this State.

As to this it is said in Weaver vs. Goulden 116 La. 473, 40 So. Rep. 798 as follows: "as to corporations the restrictive clause of this article has been read out of the text both as to servants and third persons on the principle that a corporation is always present through its agents." And further it is said "Even as between individuals this restriction has been virtually ignored in the latter decisions of this Court."

Interrogatory No. 7.

Please state whether there now exists, or did exist at the time of the injury and death of Corley Gross, above mentioned, in the State of Louisiana, any statutory rule or code provision in reference to the doctrine of the relation of fellow servants, as a defense to an action against the master for the servant's injury, and altering and varying the common-law rule on that subject.

52 A. On the 1st of June, 1905, and for many years prior thereto the statutory authority for an action for personal injuries by the servant against the master was the Articles 2317 and 2320 of the Civil Code above quoted, which are to be read in connection with Article 2315, being all on the same subject matter.

There is no statutory or codal provision in Louisiana on the subject of the relation of fellow servants, as a defense to the master. The question came before the Supreme Court of Louisiana in May, 1851, for the first time, and it was then decided that the master is not liable for damages resulting from the negligence of another servant, unless that other servant is habitually careless or unskillful. See Hubgh vs. New Orleans & Carrollton R. R. Co. 6 An. 495 to 514 (inc.). On its original hearing the Court based its opinion upon the case of Priestly vs. Fowler, 3 M. & W. 1. On a rehearing the Court rejected the Plaintiff's demand upon the ground that no action was then permitted for the death of a human being, and the rehearing opinion did not touch upon the question of fellow servant, but the case has been often cited on the first proposition and that doctrine so often approved, that it is now part of the jurisprudence of Louisiana.

I have in some of the following citations referred to cases where the question is discussed authoritatively. See also Weaver vs. Logging Co. 116 La. 468, 40 So. Rep. 798, decided in March, 1906. This case contains a restatement of the law of Louisiana as it now exists.

Referring to the Hubgh case, the Court said, page 472: "The doctrine that the servant assumes the risks of his fellow servant's negligence was examined in the Hubgh case and has ever since been uniformly followed in the jurisprudence of this State. This doctrine is based on an implied agreement that the servant undertakes to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow servant. Id. This rule of law seems to us to be reasonable and just, as otherwise the master might be held liable without any fault whatever on his part for an accidental injury by
53 one servant on his fellow." At the conclusion of the opinion (40 So. Rep. 800) you will find that the Court says further as follows: "This court has recognized and enforced to a certain extent the common law doctrine of fellow servants. The original doctrine has been modified in England and in many of our sister states by legislation. It may be said in general terms that the present jurisprudence of this State conforms to what is commonly called the 'superior servant' doctrine, and recognizes only as fellow servants those persons who are engaged in a common work under a common employment." See particularly Bell vs. Globe Lumber Co. 107 La. 725, 31 So. Rep. 994.

I would answer further on the case stated that the engineer and fireman in the operation of the locomotive are fellow servants. See cases above referred to and Satterly vs. Morgan Louisiana & Texas R. R. & S. S. Co. 35 La. An. 1166 and statements arguendo in the Twons vs. R. R. Co. case 37 La. An. 632. See also Jones vs. Southern Pacific Co. 144 Fed. Rep. 973.

Interrogatory No. 8.

Please state whether a locomotive engineer operating the engine and the fireman accompanying and co-operating with him on the same locomotive, and at the same time, and neither having the authority to employ or discharge the other, were or would be deemed by the Courts, and according to the laws of the State of Louisiana existing at the time of this alleged injury, and since, fellow-servants with each other, within and according to the meaning of the fellow servant doctrine, as a defense to the master in an action for injury through the fault of either one or the other of said servants. In answering this question please refer to such recent and well founded decisions, or other authorities, announcing the law of Louisiana on this subject, as you may find convenient.

A. They would be fellow servants. I have cited the decisions in the former answer.

Interrogatory No. 9.

In this action the plaintiffs contend that the injury and
54 death were due to the fault of the defendants in permitting cows or other stock to get upon their tracks in the State of Louisiana.

Please state what (if any) statutes or code provisions existed or obtained in the State of Louisiana on the subject of fencing railroads at the time of the injury complained of in this suit, or subsequently,

and whether there was any rule announced, either by the statutes or codes of Louisiana, or by the Courts in their decisions, requiring railroad companies having and operating railroads in that state to fence their railroads or tracks. And if there was any statutory provision or decision on this subject, either requiring or dispensing with such course on the part of railroad companies, then please refer to the same and identify it as part of your answer hereto.

A. There was no statute in Louisiana on the subject of fencing railroads at the time of the injury complained of in this suit or subsequently.

I know of no decisions of the Courts of Louisiana requiring Railroad Companies having and operating railroads in this State to fence the railroads or tracks.

Interrogatory No. 10.

Please state whether you are familiar with the history and organization and properties of the Louisiana Western Railroad Company, which is one of the defendants in this case; and if yea, please state such history and indicate the location of its railroads and other properties and the date and method of its incorporation.

A. I am not familiar with the history and organization and properties of the Louisiana Western Railroad Company.

Interrogatory No. 11.

If in answer to the last preceding interrogatory you have stated that the Louisiana Western Railroad Company is a railroad corporation, organized and chartered by an Act of Louisiana Legislature, which became effective March 30th, 1878, then please attach
55 a copy of this legislative act as part of your answer to this interrogatory, and identify the same by writing your name upon it.

A. It appears that the Louisiana Western Railroad Company was incorporated by Act 21 of the Acts of the General Assembly of Louisiana for the year 1878, and was approved on March 30th of that year and is to be found printed and bound in the official publication of the Acts of the Legislature for the year 1878, on pages 258 to 268 (inc.). This act consists of ten closely printed pages, is accessible and is admissible in evidence under the laws of the *this* State and I presume under the laws of Texas, in the form of its official publication, as above stated, and therefore I do not undertake to attach a copy of same to my answers.

Interrogatory No. 12.

Section 17 of the Act of the Louisiana Legislature, which was approved and became effective March 30th, 1878, and purports to have created and chartered the Louisiana Western Railroad Company, reads as follows:

SEC. 17. Be it further enacted, etc., That said company, its officers or employees, shall not be liable in any sum whatsoever of damages or costs in any action brought by any party against it, or them,

or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or
56 rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employees shall labor and render service, upon said railroad and upon all other railroads and transportation lines occupied and operated by said company, at their own risk, as to personal injury or loss of life, or loss or detention of, or injury to baggage, resulting from accident or alleged carelessness or negligence on the part of said company, its officers or employees, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

Will you please state whether, since the passage and approval of this Act, any amendment or other alteration has been made by the Legislature, or any other authority, altering or eliminating the language or effect of Section 17 of said Act, as above quoted.

A. I do not know of any amendment or alteration by the Legislature or any other authority altering or eliminating the language or effect of Section 17 of said Act, as quoted in this interrogatory.

Interrogatory No. 13.

Are you familiar with the constitution of the State of Louisiana, known as the constitution of 1898? If yea, please state whether said constitution contains the following provision, substantially, to-wit:

"The General Assembly shall not pass any local or special law on the following specified objects: * * * creating corporations, or amending, renewing, extending or explaining a charter thereof. * * * Grant any corporation, association or individual any special or exclusive right, privilege or immunity."

57 If you state that the provisions above quoted are contained in the Constitution of Louisiana of 1898, then please state, if you know, when such provisions were first adopted and became effective; and state whether such provisions had been adopted and existed as part of the Constitution of the State of Louisiana on March 30th, 1878, when the Act heretofore mentioned, chartering and creating the Louisiana Western Railroad Company became effective.

A. I am familiar with the Constitution of Louisiana of 1898. It does contain the clause quoted, Article 48. I find a similar provision in the Constitution of 1879, Article 46, adopted July 23rd, 1879. These Constitutions were not adopted and were not in force at the

time of the passage of the Act of 1878 aforesaid. There was no such provision in the Louisiana Constitution of 1868 in force at the time of the passage of the Charter of the Louisiana Western Railroad Company on March 30th, 1878. This law was passed under the dominion of the Constitution of 1868.

Interrogatory No. 14.

If convenient, please attach an authentic or examined copy of the Constitution of the State of Louisiana as the same existed on the 30th day of March, 1878, or make reference to some authentic code in which such constitution may be found.

A. I have not convenient a spare copy of the Constitution of Louisiana of 1868, which was the Constitution existing on the 30th day of March, 1878, but you will find a printed copy thereof issued in the Volume of the Revised Statutes of Louisiana, printed by authority of the State of Louisiana in 1870.

Interrogatory No. 15.

Please state and explain the respective provinces and functions of the judge and the jury, according to the laws and practices of the State of Louisiana, with reference to the trial and final determination of issues of fact in the trial of cases before a jury in that state.

A. In a trial before a jury under the practice in Louisiana, the jury is the judge of both fact and law. They are sole judges
58 of the facts and are supposed to take the law from the Court. The trial judges discuss in the charge the evidence only in a most general way, and they make no attempt to influence the jury by their opinion in reference to the evidence. They confine themselves as a rule to general reference and to the general rules of law, which would aid the jury in finding the truth. The result is that a trial before a jury up to the moment of the verdict is more like a hearing before an Examiner in Chancery, than anything else I can think of.

The Jury in a civil cause is composed of twelve members, nine of whom may find a verdict.

Interrogatory No. 16.

What right or power of control does a trial judge have (if any) over the verdict of the jury in the state of Louisiana, as to findings of fact, either on the question of liability or the amount of damages awarded.

A. The trial judge has the right to set aside the verdict of the jury, if he disagrees with its conclusions on the facts or on the amount of damages awarded. There is no limit to the judge's right to set aside the verdict, when he is not in accord with it on either ground. See: State ex rel. Snider 47 La. An. 1482. In other words the trial judge may grant as many new trials as he sees fit. In the case just quoted three successive verdicts in favor of the Plaintiff were set aside by the trial judge and an attempt was made to mandamus him in the Supreme Court, to compel him to sign one

of those judgments, and it was held that the Supreme Court had no power to do so. On the other hand the trial judge may force a remittitur under pain of new trial if he considers the verdict excessive and there is no power to interfere with his conduct in this respect. Landry vs. Ship Co. 112 La. 515, 36 So. Rep. 548.

59 Interrogatory No. 17.

What right, power or control, under the laws, practices and decisions of the State of Louisiana, do the appellate courts of that state have and exercise over the verdicts of juries, in damage cases for personal injury resulting in death, such as this. Explain fully, and if convenient, refer to some examples of practices in this regard.

A. The Supreme Court and other appellate Courts of Louisiana examine the evidence in all cases, including those in actions for personal injury and decide upon the facts, as they find them, without reference to the verdict of juries. In other words, the verdict of a jury, particularly in cases of that nature against corporations, has no sacramental weight and is not regarded as a final finding of facts. All the evidence is carried before the appellate Courts for re-examination and review. Warner vs. Talbot 112 La. 831, 36 So. Rep. 743; Schlater vs. Wilbut 41 La. An. 406—Wood vs. Jones, 34 La. An. 1086.

Interrogatory No. 18.

Please state fully, and illustrate, what latitude and discretion (if any) is allowed to and practiced by the judges of the trial courts and of the appellate courts of the State of Louisiana, in reforming or rendering judgments, or causing remittiturs to be entered in case of judgments based upon the verdicts of juries; and if you are familiar with the rules and practices of the Courts of the State of Texas upon these subjects, please compare the rules and practices of the two states in this regard, and indicate the differences (if any).

A. I have answered this interrogatory in answering the preceding interrogatories. I am not familiar with the rules and practices in the State of Texas on these subjects and therefore do not make any comparison.

60 Interrogatory No. 19.

From what system of law did the mutual rights and obligations and remedies obtaining between Master and servant, as recognized and administered by the Courts of the State of Louisiana originate? Are they founded in the common law, or the Civil law, and which system do they follow and conform to more closely? Explain fully.

A. The system of law regulating the obligations and remedies obtaining between master and servant, as recognized and adopted by the Courts of Louisiana originates in the statutes already quoted. Those statutes in turn were derived with modifications from the Civil law, as you will find explained in the case of Weaver vs. Goulden 116 La. 468, 40 So. Rep. 798; and the Common Law has been applied to a certain extent. I could with propriety say that our jurisprudence is sui generis—a conglomeration of many systems,

with the State Statutes as a basis, and the impression and convictions of the judges as the solution. I prefer however to refer to the Weaver case, as an answer to the enquiry contained in the last question of this Interrogatory. I ought to add however that it does not seem to me that our Courts adhere very closely even to their own prior decisions on the subject. The Supreme Court seems to have a strong tendency to make each case turn on its own facts, with the inclination to adopt any exception to the rule, which it can find, where the facts seem to justify this departure from the cases.

Cross-interrogatories.

1.

Are you regularly retained by the defendant company as its counsel in any of the courts in your State, or elsewhere?

A. I am not counsel for the defendant company in any of the courts of this State or elsewhere or otherwise.

61

2.

It is true, is it not, that the word "fault" in your Statute giving a right of action for death means substantially the same as "negligence" or "carelessness" in the common law?

A. I should hesitate to answer this affirmatively, for the reason that our Court has displayed a disposition to release the defendant or to condemn it, where the fault was slight on either side, as the facts might be.

Substantially the word "fault" as a rule means under our law such active or passive conduct as has brought about the injury in question.

3.

It is true, is it not, that the aim of your Statute is to give pecuniary compensation for the loss sustained in such cases?

A. I think the aim of our statute is to give pecuniary compensation for the loss sustained in such cases.

4.

Will you please refer to the case of Texas & Pacific R. R. Co. against Ida May Cox, reported in 145 U. S. 593-608, and in Book 36 L. Ed. pages 829-834, and if you are not already familiar with the opinion, please read the same and see, whether the acts of Louisiana purporting to be set forth in the margin, at the bottom page 830, is a true copy of the original act of your state? Also please state whether you concur in what Chief Justice Fuller of the Supreme Court of the United States has to say regarding the similarity of the Texas statute, also set out in the margin at the same place, and your statute,—"The statutes of these two states on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas? If you do not concur with the Chief Justice in the entire statement, do you agree with him that the Two Statutes "are not essentially dissimilar?"

62 A. I have read the case of Cox 145 U. S. 593. I think that the Statute of Louisiana as printed in the margin at page 30, is a true copy of the original.

Concerning the remainder of the question, I do not think I am called upon to express an opinion, as I know nothing of the settled public policy of Texas. The Statutes as printed do not seem to me to be other than as suggested by the opinion. The Special Act of 1878 creating the Louisiana Western Railroad Company does not seem to have been one of the issues in that case.

V.

If in answer to direct interrogatory No. 7, you say there was any statutory rule or code provision of the character inquired about in force at the time of the death of Corley Gross, please attach a true copy of the same to your answer hereto marking it with your initials for identification, and state when such statutory rule or code provision became effective, and how long it continued in force?

A. I have copied into my answers to the direct interrogatories herein all the statutory rules and codal provisions of Louisiana governing the subject and I have indicated a published volume where the same can be found and verified with my own quotations. I have also answered on the direct examination the other parts of this question.

VI.

It is true, is it not, that the laws of Louisiana both statute and common, as construed by the Courts of last resort of the State, imposed upon railroad corporations, operating railroads within the state and upon the defendant corporation, that is, upon the defendant Louisiana & Western Ry. Co. the duty to use ordinary care to furnish their employés with a reasonable safe place in which to work, with reasonable safe instrumentalities with which to work, and reasonably safe employés with whom to work, and that a failure to use
63 such care would constitute "fault" within the meaning of your statute, or "negligence" within the meaning of the law?

A. The Statutory law of Louisiana and the interpretation thereof by the Supreme Court undoubtedly imposes upon all employers the duty to use ordinary care to furnish to employees a reasonably safe place in which to work, reasonably safe instrumentalities with which to work, and reasonably safe employees with whom to work, considering the time, place, circumstances and conditions then and there existing and the knowledge of the employee of the same, and a failure to do so would constitute "fault" within the meaning of this statute and such fault would be negligence within the meaning of the law. Woods vs. Jones 34 La. An. 1086—Gusman vs. Caffery Co. 49 La. An. p. 1264 22, So. Rep. 742 Henry vs. Lumber Co. 48 La. An. 950, 20 So. Rep. 221: Smith vs. Sellars 40 La. An. 527 — So. Rep. —.

VII.

Has there ever been a case of the character of this one before your courts for adjudication, and if so, please state the Courts and

the decisions made, and if the case reached your Supreme Court, please give any reference to the volume and page where the same is reported, and also the volume and page of the Southern Reporter where the same is reported? If there are more than one case, give the references where each may be found as above stated?

A. I refer you to the cases cited and also to Van Amberg vs. R. R. Co. 37 La. An. 650—Wallas vs. Morgan's L. & T. R. R. Co. 38 La. An. — Gusman vs. Caffery Co. 49 La. An. 1269-70, 22 So. Rep. 742—Jones vs. Ry. Co. 51 La. An. 1247—Merchant vs. Price Woods Co. 107 La. 563—Fuller vs. Tremont Co. 114 La. 267, 38 So. Rep. 164—Harris vs. Lumber Co. 115 La. 977, 40 So. Rep. 374.

64 VIII.

Does the case of Ross vs. Summit Lumber Co. 44 So. Rep. 333 et seq. correctly state the rules applied by your Supreme Court in cases of that character?

A. I think that the case of Roff *vs.* Summit Lumber Co. 44 So. Rep. 302 correctly states the rule applied by the Supreme Court, and I refer you besides to the case of Bell vs. Lumber Company 107 La. 731, — So. Rep. 994—Stucke's case 23 So. Rep. 342—Merritt's case 35 So. Rep. 499 Evans' case 35 So. Rep. 736 and Duncan vs. R. R. 51 La. An. 1783. These and the cases previously cited represent the trend of our jurisprudence on the subject matter.

9.

If you say there was no statute on the subject of fencing railroads in your state, on the date of the death of Corley Gross, then please state, whether your courts of last resort had ever held up to that time, that the failure to fence might be taken into account by a jury in determining the question of negligence on the part of the railroad company, for an injury caused to a passenger or to an employé by the derailment of an engine or train citing the page and volume where the case or cases may be found?

A. I am not aware of any case decided by our Supreme Court on the subject matter of this Interrogatory.

10.

Is it not true that the rules of the common law as generally understood throughout the United States are looked to by the courts in determining the questions of contributory negligence and assumed risks in actions for death and personal injury brought by servants against their masters, in your state?

A. I am not able to say that the rules of the Common Law as generally understood throughout the United States are looked to in Louisiana in determining questions of contributory negligence and assumption of risk in actions for personal injury brought
65 by servants against their masters. I refer to my testimony already given here. My understanding is that the Supreme Court of this State determines in each case whether there is contributory negligence primarily as a matter of fact, and the rule is general

that if on the whole case it appears that the accident would not have happened but for the negligence of the injured person contributing thereto, there can be no recovery. In considering this the doctrine of the "last clear chance" plays its part.

I have already shown by references to the case- of Hubgh, Weaver and Duncan and other cases cited, that the servant is as a matter of law, supposed to assume the risk of personal injury, subject to the qualifications stated in these cases. The Evans and Merritt cases indicate this also. It is clearly stated in the Weaver case that the servant whose negligence is assumed as one of the risks of employment, is a person actually engaged on the same physical work with the injured person.

11.

If you conceive there is a difference or dissimilarity between the rules of the common law as applied in your state and in Texas in such cases please point out wherein the difference consists as you understand it?

A. I am not familiar with the rules of the Common Law as applied in Texas, and cannot undertake to make the comparison suggested. The references I have made to the Louisiana cases will enable you to make the comparison.

12.

Please state, who are, and who are not, fellow servants under the law of your state, and the law to which you look in determining the question?

A. I have cited cases ante, showing illustrations of who are and who are not fellow servants, under the law of Louis-
66 iana. It would be impossible to make a complete list of all the cases bearing upon that subject with the time at my disposal. The Court. as is decided in the Weaver case, has adopted to a certain extent the "superior servant doctrine" I understand, as I have already stated, that they look in each case at the facts, to ascertain whether the servants involved were or were not actually engaged on the same task, at the same time and with the same common object. I understand that contemporaneous and the presence of each other, is one of the tests to determine whether the negligence of one affects the other. To illustrate by the cases cited, I should say that two servants in separate departments on the same work actually engaged in a task in which they were in contact with each other, would be fellow servants to the discharge of the master.

Unquestionably in determining a question of this character the Supreme Court follows its own statute and decisions, if there be any, but if the question is "res nova" authorities from any respectable source are considered, as they should be, as assisting to a conclusion.

13.

If you say the charter of the Louisiana & Western Ry. Co. contains the provisions set out in direct interrogatory No. 12, then please

state, whether such provisions granted the corporations "any special or exclusive rights, privileges or immunity."

A. At the time the Charter of the Louisiana Western Railway Company was granted by the Legislature of Louisiana in 1878, it had authority under the Constitution of Louisiana to create corporations by Special Act, a power which it frequently exercised, in fact it may be said to have been the public policy at that time.

Whether the provisions referred to are "special or exclusive rights, privileges or immunities" it would seem to me, is a matter for judicial determination. In the absence of any provision in the Constitution of 1868 prohibiting same I would hesitate to pro-
67 nounce the provisions in question to be in that category. In a legislative charter it would seem to me, to be entirely within the province of the Legislature, unrestricted by constitutional limitations, to grant, limit or specify the rights, duties, powers, etc., of its own creature. In this connection you will recall that the Constitution of 1868, already referred to, is that Constitution under which the Acts were passed which are interpreted in the Slaughter House cases in the Supreme Court of the United States.

14.

Has the said provision ever been construed by your courts of last resort as to the question of its being opposed to the public policy of your state? Has its constitutionality, either under your own constitution, prior to the date of the accident, or under the constitution of the United States ever been passed upon? Has it ever been held valid or invalid by any of your courts? In answering the foregoing questions, please refer to your official Reporter, and the Southern Reporter for the decisions that may have been made, if any, on the point?

A. I am not aware of any decision construing this particular provision of the Charter of the Louisiana Western Railway Company. Other provisions of the same Statute have been passed upon by the Supreme Court, thus the provision giving that corporation the right to expropriate property by special procedure was recognized and enforced in La. Western R. R. Co. vs. Central Improvement Company 119 La. 927 44 So. Rep. 732; also the special privilege in the charter of the Morgan's Louisiana & Texas R. R. & S. S. Co. Act No. 37 of 1877 in regard to immunity from suit except at domicile was affirmed in Heirs of Gassin vs. Williams et als. 36 La. An. 187 and St. Julian vs. Morgan's La. & Tex. R. R. & S. S. Co. 39 La. An. 1063.

15.

Did the corporation ever at any time surrender its right to
68 claim the "privilege or immunity" granted by the said provisions?

A. I have never represented the defendant corporation and therefore cannot answer this question. I have no knowledge of the subject matter.

16.

Do you believe the provision valid or invalid?

A. I should consider the provision valid. I have indicated this opinion in a previous answer, and I add this additional reason, that the right to recover for such injuries being statutory in Louisiana, it would seem reasonable where the Legislature has the right to create a corporation by special Act, that it would safeguard the grant or regulate or control rights or privileges under it, with the same validity that it could make the original grant.

17.

Has the provision ever been pleaded by the corporations as a defense to any suit in any of your courts, and if so, please name some of the cases and courts and the rulings made?

A. In answer hereto I repeat the answer to cross Interrogatory Fifteen.

18.

It is true, is it not, that during the period since the granting of the charter, there have been many suits against the Corporations of the character referred to in the said charter provision? Has the company set up the same in the suits as a defense? Has it ever done it? If it has not done it, state why it has not availed itself of the provision as a defense?

A. For the reasons given in answer to Cross Interrogatory Fifteen, I can only repeat the answer. I know nothing whatever about the subject matter.

19.

In what form was the charter of the Louisiana & Western Ry. Co granted? Where may the charter be found? Is it evidenced
69 alone by legislative grant, or is there any paper writing evidencing it? If yea, in whose possession is it, and in whose possession has it been and where has it been kept since it was made?

A. I have shown in my previous answers on direct and cross examinations that the charter is a legislative one and I have indicated where it could be found. In this State the printed Acts of the Legislature are received just as you would receive the Original Act, as passed, signed and promulgated. I imagine that the original custodian of these acts was the Secretary of State of Louisiana. I have never had occasion to hunt down the original of any Act of the Legislature and therefore answer as I do.

20.

Has the charter the standing of a public law or of a private act? Do your Courts take judicial notice of it, or is it necessary to prove it in order to get it before the Courts under your practice and law?

A. I should consider this charter to partake of both characters. It is unquestionably a law, but I am not aware of any decision holding that the Courts would take official notice of it. I should consider it necessary to prove it in order to get it before the Courts under our

practice and law; in any event, that's the course I would follow if I were seeking to maintain it before our Courts.

21.

If the Louisiana & Western Ry. Co. should wish to avail itself of the said provision, in its charter as a defense to any action brought against it of the character therein mentioned, would or would it not be necessary for the corporation to specially plead and prove the said provision?

A. In the absence of decisions upon the subject I should certainly plead and offer the Statute, if I were to defend the case. The proof of it in this State would be a mere matter of offering the printed volume containing the Act, which is issued under the au-
70 thority of the State of Louisiana.

22.

Were the employés at and prior to the time of the death of said Gross advised in any way of the existence of the said provision in the charter and of the effect that it had upon their rights as employés in case they should be injured in the service of the corporation?

A. I know nothing of the facts of this case, except those set out in the several interrogatories and therefore I cannot answer this question.

23.

If you say they were, please state the manner in which they were advised? Please be explicit. Can you say that Corley Gross knew of the existence of the said provision and knew the effect it would have on the right of his parents in case he should be killed while in the service of the corporation?

A. I make the answer that I have made in answer to Interrogatory No. Twenty Two, just answered.

24.

Since the granting of the charter have you adopted any constitutional provisions which nullify or neutralize the effect of said provision, and if so, please attach an examined copy of such provisions, and state when they became effective?

A. I am not aware of any Constitutional provisions which nullifies or neutralizes the provisions of the Charter aforesaid. As to the effect of the Article of the Constitution of 1879 and 1898 referred to in Interrogatory No. Thirteen, I would not consider these provisions to have the effect of nullifying or neutralizing the charter aforesaid.

25.

You have been asked in a number of the direct interrogatories to refer to decisions of your courts in support of your statement of the different rules of law having reference to actions for death in your state, if the decisions to which you refer have
71 been qualified, modified, explained or overruled, please point out the cases in the volumes of your Reporter and of the Southern Reporter where this has been done?

A. I am not aware of any of the decisions referred to in previous answers have been qualified, modified, explained or overruled. I have quoted cases which refer to all the cases used in these answers I have endeavored to give a fair reference to the jurisprudence on the subject matter."

Second. The defendants next offered and introduced in evidence Act No. 21 of 1878 of the Legislature of the State of Louisiana, approved March 30th, 1878, creating the corporation of the Louisiana Western Railroad Company one of the defendants in this cause, said Special Act, after conferring and imposing general powers and duties ordinarily incident to a railroad company maintaining and operating railroads and trains within the State of Louisiana contains the following provisions, to-wit:

SEC. 17. Be it further enacted, etc. That said company, its officers or employees, shall not be liable in any sum whatsoever of damages or costs in any action brought by any party against it, or them, or any or either of them, for any injury to the person, or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness, or negligence on the part of said Company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon the railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said Company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all
72 such free passengers shall travel, and all such employees shall labor and render service, upon said railroad and upon all other railroads and transportation lines occupied and operated by said company, at their own risk, as to personal injury or loss of life, or loss or detention of, or injury to baggage, resulting from accident or alleged carelessness or negligence on the part of said company, its officers or employees, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

In this connection it was agreed between the counsel for all parties and with the consent of the Court, that reference may be had, for the purpose of this record, to the original of said Act as regularly published and printed under authority of the State of Louisiana, for the purpose of ascertaining each and all of the provisions thereof.

Third. The defendants next offered and introduced in evidence the State Constitution of 1868 of the State of Louisiana, and in this connection it was agreed between counsel of all parties and with the consent of the Court, that reference may be had, for the purpose of this case, to the said constitution as the same is printed in the Louisiana Revised Statute of 1870, issued under the authority of the State of Louisiana.

Fourth. The defendants offered and introduced in evidence in connection with the depositions of H. P. Dart, Article 2315 of the Revised Civil Code of Louisiana of 1870, page 283, which reads as follows:

Art. 2315 (2294)—Every act whatever of man that causes damage to another obliges him by whose fault it happened
73 to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them, for the space of one year from the death."

Fifth. The defendants next offered and introduced in evidence, in connection with the depositions of H. P. Dart, and to establish the contention that the clause in the Special Act giving immunity from liability is valid, the following reported decisions:

Louisiana Western Railroad Company vs. Central Improvement Company, 119 La. 927; 44 So. Rep. 732.
Heirs of Gassin vs. Williams et al., 36 La. An. 187.
St. Julian vs. Morgan's La. & Texas R. R. & S. S. Co., 39 La. An. 1063;
Butchers Benevolent Assn. vs. Crescent City (U. S. Sup. Ct.) 21 Law Ed. 394.
Butchers Union S. S. Co. vs. Crescent L. S. Co. 28 Law Ed. 585 U. S. Sup. Ct.
Pecot vs. Police Jury, 41 La. 707 6 So. Rep. 677.
Vredenberg vs. Behan, 33 La. An. 643.
Idem: 37 La. An. 652.

Sixth. The defendants offered and introduced in evidence the following adjudicated cases and decisions, in connection with the depositions of the witness, H. P. Dart, and in support of their contention of substantial variance between the laws of Texas and Louisiana:

Eichorn vs. R. R. Co. 112 La. 250 36 So. Rep. 335.
R. R. Co. vs. Richards 68 Tex. 375.

On mental suffering as a measure of damages in Louisiana:
Stewart vs. Ry. Co. 112 La. 767, 36 So. Rep. 676.
Graham vs. Telegraph Co. 109 La., 1070 34 So. Rep. 91.
Parker vs. Lumber Co. 115 La., 463; 39 So. Rep. 445,
Brinkman vs. Oil Co., 118 La., 846; 43 So. Rep. 458.

On Fellow Servants:
Hubgh vs. N. O. & Carrollton R. R. Co., 6 An. 495-514.
Weaver vs. Logging Co., 116 La. 468; 40 So. Rep 798.

74 On the limitation of powers of juries in Louisiana:
Snider, 47 La. An., 1482.
Warner vs. Talbot, 112 La. 831; 36 So. Rep. 743.
Schlater vs. Wilbut, 41 La. An. 406.
Woods vs. Jones, 34 An. 1086.
Weaver vs. Goulden, 116 La. 468; 40 So. 798

The plaintiffs here offered and introduced in evidence, in connection with said plea, the Fifth, Sixth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth Direct Interrogatories propounded to the witness, H. P. Dart and his respective answers thereto, together with the authorities therein cited by him, all of which interrogatories and answers are hereinbefore fully set out.

And the plaintiffs by counsel, also offered the Second, Third, Fourth, Sixth, Seventh, Eighth Cross Interrogatories propounded to the witness H. P. Dart, and said witness's respective answers thereto, together with the authorities therein cited by him, all of such cross interrogatories and said answers and citations are hereinbefore fully set out.

The plaintiffs by counsel thereupon offered and introduced in evidence the decision of:

Whitworth vs. Lumber Company, 46 So. Rep. 912; and
Taylor vs. Company, 46 So. Rep. 703; also
Day vs. Louisiana Western Railway Company.
Ry. Co. vs. Cox (U. S. Sup. Ct.) 145 U. S. 593.

It was agreed by counsel of all parties in open Court and with consent of the trial judge, that for the purposes of hearing and determining the said pleas to jurisdiction and in abatement the various adjudicated cases and decisions which were introduced by both parties and cited in the depositions of the witnesses H. P. Dart and introduced and read in evidence, as above recited, should be regarded as before the Court and in the record and that the reports thereof as made and set forth in the printed volumes of the Louisiana Reports and the Southern Reporter and the Federal Reporter and the United States Supreme Court reports, should be adopted and
75 referred to as part of the record in this cause, for the purpose of determining the extent and effect of such decision.

It was further understood and agreed between counsel, with the consent of the Court, that the evidence introduced on the merits by and on behalf of plaintiffs, either originally by them or on cross examination by their counsel, should be considered by the Court in passing upon the pleas to the jurisdiction and in abatement, and was in fact so considered; and reference is made to the statement of facts herein for such evidence.

And the Court having heard the said pleas to the jurisdiction and in abatement, together with the aforesaid evidence introduced thereon, and having heard argument of counsel, doth find and consider that the said pleas are not well taken and hereby overrules the same, in all things, and to this ruling of the Court the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, and each of them, then and there in open Court duly excepted, and here now tender this their joint bill of exception and pray that same be allowed and approved as part of the record in this cause; and it is accordingly so ordered.

(Signed) CHAS. E. ASHE.
*Judge 11th Judicial District Court,*
*Harris County, Texas.*

Filed Feb'y 16th, 1909. Henry Albrecht, C. D. C. H. C. by Frank H. Meyer, Deputy.

*Defendants' Bill of Exception # 2.*

(Filed Feb'y 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS

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TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

76 Be it remembered that upon and during the trial of the above entitled and numbered cause on its merits the plaintiffs offered in evidence Printed Rule No. 334, the same being contained and expressed in a book of rules and regulations of the operating department of the Morgan's Louisiana & Texas Railroad and Steamship Company and the Louisiana Western Railroad Company, Revised Edition, issued September 1, 1902, and admitted to have been in force on the railroad of the Louisiana Western Railroad Company in Louisiana at the time of the death of Miller and Gross, but there being no recital or notation on or in connection with said book of rules that it had been promulgated or issued under the authority of the Texas and New Orleans Railroad Company; the said Rule No 334 offered reads as follows, to-wit:

"It is the duty of every employé, regardless of department, to report defects in road or bridges, or obstructions of any kind, to the superintendent, and, if possible, to the nearest section or bridge foreman. When necessary, flags and torpedoes must be left to notify approaching trains; and when there is any reason to believe that the safety of the track of any structure is endangered by flood, fire or other causes, any employé, before attempting its use, must make a personal inspection, using all precautions in the interest of life and property."

The defendants, Louisiana Western Railroad Company and the Texas & New Orleans Railroad Company, and each of them, for itself, then and there objected to the reading and introduction of said printed rule, for the reason that same was irrelevant and immaterial to any issue in the case as to either of said defendants.

These objections the Court overruled and permitted the plaintiffs to read and introduce said rule in evidence, and to this ruling of the Court the defendants, and each of them, for itself, then and there duly excepted and here tender this a joint and several bill of exception No. 2, and pray that same be allowed and certified as
77 part of the record in this cause; and it is accordingly so ordered.

(Signed CHAS. E. ASHE, *Judge.*

Filed February 16th, 1909. Henry Albrecht, Clerk District Court, Harris County, Texas, by Frank H. Meyer, Deputy.

*Defendants' Bill of Exception No. 3.*

(Filed Feb'y 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

No. 39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: That upon and during the trial of the above entitled and numbered cause on its merits the plaintiffs offered in evidence Printed Rule No. 420, the same being contained and expressed in a book of rules and regulations of the operating department of the Morgan's Louisiana & Texas Railroad and Steamship Company and the Louisiana Western Railroad Company, Revised Edition, issued September 1, 1902, and admitted to have been in force on the railroad of the Louisiana Western Railroad Company in Louisiana at the time of the death of Miller and Gross, but there being no recital or notation on or in connection with said book of rules that it had been promulgated or issued under the authority of the Texas & New Orleans Railroad Company; the said Rule No. 420 offered reads as follows, to-wit:

"The track must be kept clear; and it is the duty of foremen to turn out promptly with all their men and remove any obstruction, whenever notified by trainmen or others, even though the obstruction may not be on their sections. If notified of broken rails on an adjoining section they must at once make track safe for trains.

78 "Anything that interferes with the safe passage of trains at full speed is an obstruction".

The defendants, Louisiana Western Railroad Company and the Texas & New Orleans Railroad Company, and each of them, for itself, then and there objected to the reading and introduction of said printed rule, for the reason that same was irrelevant and immaterial to any issue in the case as to either of said defendants.

These objections the Court overruled and permitted the plaintiffs to read and introduce said rule in evidence and to this ruling of the Court the defendants, and each of them for itself, then and there duly excepted and here tender this a joint and several bill of exception No. 3 and pray that same be allowed and certified as part of the record in this cause, and it is accordingly so ordered.

(Signed) CHAS E. ASHE, *Judge.*

Filed Feb'y 16, 1909. Henry Albrecht, C. D. C. H. C. by Frank H. Meyer, Deputy.

*Defendants' Bill of Exception* #4.

(Filed Feb'y 16, 1909.)

Be it remembered: That on the trial of the above entitled and numbered cause, upon its merits, the plaintiffs Felix Gross and Theresa Gross while testifying as witnesses for themselves, proposed and offered to prove by their own testimony, that frequently during his lifetime and during his employment in the service of the defendant companies, as fireman, their son, Corley Gross, had declared to witnesses his purpose to contribute of his earnings to their support and maintenance as long as they, or either of them, should live.

79 The defendants, and each of them for itself, then and there objected to the introduction of such testimony, for the reason that the same was irrelevant and immaterial, involved hearsay, and was in the nature of self-serving declarations, and same was too remote and speculative as a basis or measure of damage in this cause; which objections were overruled by the court and said testimony was admitted; and to this ruling of the court the defendants, and each of them, in open Court, duly excepted and now here tender this their bill of exception No. 4 and pray that same may be allowed and approved by the Court as part of the record in this cause, and it is accordingly so ordered.

(Signed) CHAS. E. ASHE, *Judge.*

Filed February 16, 1909. Henry Albrecht C. D. C. H. C. by Frank H. Meyer, Deputy.

*Defendants' Bill of Exception* #5.

(Filed Feb'y. 16th, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: That upon the trial of the above entitled and numbered cause and during the hearing upon the merits, the plaintiffs offered and proposed to introduce in evidence the Fifth Direct Interrogatory propounded to the witness Henry P. Dart, and the answer of said witness thereto, which interrogatory, together with its answer reads as follows, to-wit:

"If in answer to the last preceding interrogatory you have stated that the right of action inquired about therein does exist and is

recognized in the state of Louisiana, by virtue of a local
80 statute or code, please give reference to the same and quote it at length, as part of your answer hereto.

A. The local statute which governs actions for personal injury is as stated in the answer to the last interrogatory. As it exists today the same will be found printed in Merrick's Annotated Edition of the Revised Civil Code of Louisiana as Article 2315, page 559, and it is in the following language:

"Article 2315: Obligation to Repair Damage Caused by Wrongful Acts: Survivorship of Action: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

And thereupon the defendants, and each of them for itself, respectively, objected to the introduction of said question and answer as evidence in this case, on the following grounds: (1) That the proposed testimony was irrelevant and immaterial to any issue in the cause: and (2) that the statutory law mentioned and described in the answer and deposition of said witness and offered, was not admissible under the plaintiffs' pleading, the plaintiffs not having alleged or declared upon the existence of such statute and law as a basis of action; and (3) that the right of action, if any, created, or attempted to be created by the statute mentioned and described in said answer and deposition was so done or attempted by the legislature of Louisiana after the time of the enactment and approval by said legislature of the Act of 1878 creating the Louisiana Western Railroad Company, and that in so far as the action for injuries resulting in death is afforded by the amended Article 2315 mentioned in said
answer and this right of action is sought to be declared upon
81 and enforced against the defendants, or either of them, for the death of Miller and Gross on a railroad owned and operated in the State of Louisiana, it would impair the obligation of the charter contract and violate the immunities and exemptions stipulated in section 17 of the Act of the Legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, and that Article 2315 as amended by the Legislature of Louisiana in 1884, so as to give or attempt to give the right of action here asserted, would have the effect of impairing the obligation of the contract and would thus be violative of the provisions of the Constitution of the State of Louisiana and of the State of Texas, and of the United States of America.

Which objections on the part of the defendants and each of them, the court overruled, and thereupon permitted the proposed testimony to be read and introduced in evidence, and to this ruling of the Court the defendants and each of them, for itself, then and there in open Court duly excepted and now here tender this their joint and several bill of exception, and pray that same be certified and approved by

the Court as part of the record in this cause; and it is accordingly so ordered.

(Signed) CHAS. E. ASHE, *Judge.*

Filed Feb'y 16, 1909. Henry Albrecht C. D. C. H. C. by Frank H. Meyer, Deputy.

*Defendants' Bill of Exception* #6.

(Filed Feb'y 16th, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: That on the trial of the above entitled
82 and numbered cause upon its merits the plaintiffs offered in evidence the Sixth Direct Interrogatory propounded to the witness Henry P. Dart and the following portions of the witness's answers thereto:

"If in answer to preceding interrogatories you have indicated the authority and basis (if any) upon which the Courts in the State of Louisiana recognize and award damages for injuries resulting in death, inflicted through the fault of another person, then please state what were the rules of law obtaining in the State of Louisiana on the date of the alleged injury, with reference to the measure of damages and elements of damage allowed for such injuries, to those entitled to the action.

"And in this connection state: (*a*) Whether the damages so allowed the surviving parents and the surviving wife and children, include compensation for the wounded feelings and affections of the survivors, or for deprivation of the society of the deceased; and in this connection make reference to any decisions or other authorities on this subject: and (*b*) state whether the fact that a deceased child for whose death action was brought by the parents has passed its majority, is a circumstance to be considered by the Judge or jury in connection with the measure or amount of damages that may be awarded, and in this connection refer to any decision or other authority that may be convenient.

"A. The State Courts of Louisiana recognize and resort to the foregoing statute as the basis of authority for all cases involving actions or claims for personal injury. There is no law or authority for such an action in the Courts of Louisiana, other than the Article of the Civil Code aforesaid and the amendments thereto. The Civil Code however contains nine articles on the general subject, which in Louisiana goes by the title of 'Offences & Quasi Offences' the Articles being 2315 (already cited) to 2324 (inclusive) which articles I ap-

pend to this answer omitting 2315, already quoted, in order that the entire statutory law on the subject matter shall be placed
83 before you. Of course, these articles have been the subject of judicial construction and interpretation for many years and the decisions are, from my point of view, "Law or authority" under the Code, and you will so understand my answer.

"The Articles above mentioned are as follows:

Article 2316. Negligence, imprudence or want of Skill:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

Article 2317. Liability for acts of others and things in our charge: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

* * * * * * *

Article 2320. Acts of Servants etc.: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

In the above cases responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done so."

Before the adoption of the amendment of 1884 these statutes were construed as limiting the survivor's action to the right of action which the deceased would have had, had he survived the injury. Vredenburg vs. Behan 33 La. An. 643.

After the passage of the Act of 1884 the Court declared that the Act created an obligation by expressly declaring the existence of a liability where there was none before, and opens the way to a recovery for its violation." Van Amberg vs. R. R. Co. 37 La. An. 652. Eichorn vs. R. R. Co. 112 La. 250; 36 S. R. 335.

84 Therefore as the law stood at the date of this accident and as it now stands, the survivor may recover:

(1) The damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness. These are called heritable damages.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

On both propositions see Eichorn vs. R. R. Co. 114 La. 718 et seq., 38 S. R. 526 Payne vs. Lumber Company, 117 La. 991, 42 So. Rep. 475; Dobyns vs. R. R. 119 La. 82; 43 So. Rep. 934.

(3) To these elements the Court has now added recovery for mental suffering of the survivor. See Stewart vs. R. R. 112 La. 767; 36 So. Rep. 676 as applied in Graham vs. Telegraph Company 109 La. 1070, 34 So. Rep. 91; Parker vs. Lumber Co. 115 La. 463, 39 So Rep. 445 and note the qualification in Brinkman vs. Oil Co. 118 La. 846, 43 So. Rep. 458.

(4) Vindictive or punitory damages are not permitted in actions for personal injury against a corporation. McGary vs. City 12 Rob. (La. Reports) 675; McFee vs. R. R. Co. 42 La. An. 790. Patterson vs. R. R. Co. 110 La. 797, 34 So. Rep. 782 and Parkerson case 115 La. 468.

(5) No action lies under the statute in favor of the surviving child who had reached the age of majority before the accident. Huberwald vs. R. R. Co. 50 La. An. 477, 23 So. Rep. 474. In Eichorn vs. New Orleans & Carrollton R. R. Co. 114 La. 712, So. Rep. 5259-531, you will find that the child's right of action was recognized, where the child being a minor at the date of the accident had reached the majority since then. The age of majority in Louisiana is 21 years. Where the action runs in favor of minors the damages are apportioned according to their respective majorities. See Eichorn's case 114 La. at p. 726.

85 (6) Children under the code of Louisiana, Article 229 "are bound to maintain their father and mother and other ascendants who are in need" on the other hand the child under Article 216 of the Civil Code remains under the authority of his parents until his majority.

There is also further provision, Articles 230-231, defining alimony as "what is necessary for the nourishment, lodging and support of the person who claims it."

In Myhan vs. Electric Co. 41 La. An. 969, the parents claimed for the death of a son of eighteen years. The Court, referring to his duty said: "The probability is that as he was a robust young man, attentive to his duties and kind to his parents, he would have advanced in life and bettered his and their condition. In the course of years he would have accumulated earnings to some reasonable extent, due regard had to his personal wants and necessities, etc."

This would indicate that the child over majority owes certain obligations to his parents. I do not think these are the same he would owe or that they could expect from a minor. Therefore I consider under our law that question Six, subsection (*b*) must be answered in the affirmative. In the Myhan case the Court allowed $2000.00 for the death, as a sum that would relieve the parents "for a while to some extent from the immediate consequences attending the severe injury inflicted on them."

The Supreme Court of Louisiana has decided that the restrictive clause of Article 2320 has been read out of the Article as the result of the Jurisprudence of this State.

As to this it is said in Weaver vs. Goulden, 116 La. 473; 40 So. Rep. 798, as follows: "As to corporations the restrictive clause of this article has been read out of the text both as to servants and third persons on the principle that a corporation is always present through its agents." And further it is said "Even as between individuals this restriction has been virtually ignored in the latter decisions of this court."

86 And to the proposed introduction of said question and answer and testimony, the defendants, and each of them, objected, for the reasons: (1) that the proposed evidence was irrelevant

and immaterial; (2) that the statutory right of action and the rules of law pertaining thereto as applicable to such injury and death, occurring in Louisiana, were nowhere alleged or declared upon as a basis of action by plaintiffs in their pleading, and hence the evidence proposed was not admissible under the plaintiffs' pleading; and (3) that the right of action created or attempted to be created by the Louisiana Statute of 1884, in behalf of the designated surviving relatives for the injury resulting in the death of deceased, was so created or attempted to be created by the Louisiana Legislature in the year, 1884, and long after the passage of the Act of 1878 incorporating the Louisiana Western Railroad Company in said state, and granting it the certain immunities and exemptions from liability expressed in section 17 of said incorporating act, and after the said railroad company had acted in good faith in accepting the terms and provisions of said incorporating Act and acquiring vested rights thereunder, and that the effect of said amended Act of 1884, creating or attempting to create such right of action as plaintiffs are asserting herein as against the defendants, tends to impair and would impair, if enforced, the obligation of contract and deprive defendants of vested rights under their contract, in violation of the constitutions of the United States and of the State of Louisiana and of the State of Texas:

These objections were overruled by the Court and plaintiffs were permitted to read and introduce said interrogatory and answer above quoted, as evidence in this case, and to this ruling of the Court the defendants and each of them then and there in open Court duly excepted and now here tender this their joint and several bill of exception No. 6, and pray that same be approved and certified by the Court as part of the record in this cause; and it is accordingly so ordered.

(Signed) CHAS. E. ASHE, *Judge.*

Filed February 16th, 1909. Henry Albrecht, C. D. C. H. C. by Frank H. Meyer, Deputy.

87 *Defendants' Bill of Exception #7.*

(Filed Feb'y 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: That on the trial of the above entitled and numbered cause upon its merits, the plaintiffs offered and proposed to read and introduce in evidence certain answers and portions of

answers of the witness Henry P. Dart, to direct and cross interrogatories as follows:

In answer to the Seventh Direct Interrogatory the witness testified:

"On the 1st of June, 1905, and for many years prior thereto the statutory authority for an action for personal injuries by the servant against the master was the Articles 2317 to 2320 of the Civil Code above quoted, which are to be read in connection with Article 2315, being all on the same subject matter."

In answer to the Second Cross Interrogatory the witness says: "Substantially the word "Fault" as a rule means under our law such active or passive conduct as has brought about the injury in question."

To the Third Cross Interrogatory he answers:

"I think the aim of our statute is to give pecuniary compensation for the loss sustained in such cases."

In answer to the Fourth Cross Interrogatory, the witness says:

"I have read the case of Cox, 145 U. S. 593. I think that the Statute of Louisiana as printed in the margin at page 30, is a true copy of the original."

In answer to the Sixth Cross Interrogatory the witness answers as follows:

88 "The Statutory law of Louisiana and the interpretation thereof by the Supreme Court undoubtedly imposes upon all employers the duty to use ordinary care to furnish to employees a reasonably safe place in which to work, reasonably safe instrumentalities with which to work and reasonably safe employees with whom to work, considering the time, place, circumstances and conditions then and there existing, and the knowledge of the employee of the same, and a failure to do so would constitute "fault" within the meaning of this statute and such fault would be negligence within the meaning of the law. Wood vs. Jones 34 La. An. 1086—Gusman vs. Caffery Co. 49 La. An. p. 1234, 22 So. Rep.; 742; Henry vs. Lumber Co. 48 La. An. 950; 20 So. Rep. 221; Smith vs. Sellars, 40 La. An. 527 — So. Rep. —."

In answer to the Seventh Cross Interrogatory the witness answers as follows:

"I refer you to the cases cited and also to Van Amberg vs. R. R. Co. 37 La. An. 650—Wallis vs. Morgan's L. & T. R. R. Co. 38 La. An. 156—Gusman vs. Caffery Co. 49 La. An. 1269-70, 22 So. Rep. 742—Jones vs. Ry. Co. 51 La. An. 1247—Merchant vs. Price Woods Co. 107 La. 563—Fuller vs. Tremont Co. 114 La. 267, 38 So. Rep. 164—Harris vs. Lumber Co. 115 La. 977, 40 So. Rep. 374."

In answer to the 8th Cross Interrogatory the witness answers as follows:

"I think that the case of Roff vs. Summit Lumber Co. 44 So. Rep. 302 correctly states the rule applied by the Supreme Court, and I refer you besides to the case of Bell vs. Lumber Company 107 La. 731, 31 So. Rep. 994—Stucke's case 23 So. Rep. 342—Merritt's case 35 So. Rep. 499, Evans' case 35 So. Rep. 736 and Duncan vs. R. R.

51 La. An. 1783. These and the cases previously cited represent the trend of our jurisprudence on the subject matter."

Thereupon the defendants objected to the said answers and depositions of the witness, above quoted, and objected to the
89 introduction thereof, on the following grounds: (1) that said proposed testimony was immaterial and irrelevant; and (2) that the statutes and rules of law and other matters testified to in said depositions and here objected to are not alleged or declared upon as a basis of action by plaintiffs in their pleading herein, and are not admissible under their pleading, as a basis for recovery; and (3) that in so far as said evidence tends to establish the creation and existence in the state of Louisiana of a statutory right of action in plaintiffs for injuries causing the death of Miller and Gross, such statute having been enacted in the year 1884, and subsequently to the passage and approval by the Louisiana Legislature of the Special Act of 1878, incorporating the Louisiana Western Railroad Company, and giving it, as part of its charter rights, the exemptions and immunities stipulated in section 17 of said incorporating Act, which was accepted and acted upon by it in good faith, would have the effect of impairing the obligation of the contract and to deprive defendant of its vested rights thereunder, contrary to the constitutional provisions of the United States of America and of the State of Louisiana and the State of Texas.

And the Court overrules said objections, to which ruling of the Court the defendants, and each of them, for itself, then and there duly excepted and now tender this their joint and several bill of exception No. 7 and pray that same may be allowed and approved and certified by the Court; and it is accordingly so ordered.

(Signed) CHAS. E. ASHE, *Judge.*

Filed Feb'y 16, 1909. Henry Albrecht, C. D. C. H. C. by Frank H. Meyer, Deputy.

90 *Defendants' Bill of Exception* #8.

(Filed Feb'y 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered that at the conclusion of the trial of the above entitled and numbered cause on its merits the Court having announced and rendered his judgment in favor of plaintiffs and against defendants therein, the defendants thereupon requested the trial

judge to prepare and submit his findings and conclusions of fact and law upon which said judgment was predicated, and thereupon the trial judge did prepare and cause to be filed herein, on January 30th, 1909, the findings and conclusions of fact and law upon which he based his said judgment; and thereupon in open Court the defendants Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, and each of them excepted to each and every portion and paragraph of the said findings of fact and conclusions of law, which findings and conclusions as set forth and signed by the said judge and filed herein are hereby referred to and made parts hereof; and the defendants and each of them caused said exceptions to be entered in the final judgment record and now here tender this their joint and several bill of exception No. 8, and pray that same be allowed, approved and certified by the Court as part of the record in this cause, and it is accordingly so ordered.

(Signed) CHAS. E. ASHE, *Judge.*

Filed Feb'y 16, 1909. Henry Albrecht C. D. C. H. C. by Frank H. Meyer, Deputy.

91 *Appeal Bond.*

(Filed Feb'y 19th, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Whereas, in the above entitled and numbered cause pending in the District Court of Harris County, Texas, for the 11th Judicial District during a regular term of said Court on, to-wit: January 30th, 1909, the plaintiffs in said cause, Felix Gross and Theresa Gross, recovered judgment against the defendants, Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, for the sum of $6000.00,—$3000.00 of said recovery being apportioned to each of the said plaintiffs,—together with interest from date of judgment and costs of suit; from which judgment the said defendants, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, have appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas:

Now, therefore, know all men by these presents: That we, the said Texas & New Orleans Railroad Company, and Louisiana Western Railroad Company, as principals, and The United States Fidelity & Guaranty Company, as sureties, acknowledge ourselves bound to pay

unto the said Felix Gross and Theresa Gross, appellees, the sum of Fifteen Thousand Dollars ($15,000.00); Conditioned: that said appellants, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company shall prosecute their appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against them, they shall perform its judgment, sentence or decree, and pay all such damages as said court may award against them.

92 In testimony of which witness our hands this the 19th day of February, A. D. 1909.

TEXAS & NEW ORLEANS RAILROAD COMPANY &
LOUISIANA WESTERN RAILROAD COMPANY,
*Principals,*
By LANE, JACKSON, KELLY & WOLTERS,
*Attorneys.*

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By E. A. ROBBINS &
SEWALL MYER.
*Sureties, Its Attorneys in Fact.*

The above and foregoing appeal bond is accepted and approved and filed this the 19th day of February, A. D. 1909.

HENRY ALBRECHT, *C. D. C., H. C.*,
By T. W. BROWNE, *Deputy.*

Filed Feb'y 19, 1909. Henry Albrecht, C. D. C. H. C. by T. W. Browne, Deputy.

*Assignment of Errors.*

(Filed March 16, 1909.)

In the District Court of Harris County, Texas, 11th Judicial District.

#39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Now in the above entitled and numbered cause come the defendants Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, and having excepted to the judg-
93 ment of the court and the conclusions of fact and law entered against them by the judge of said court, on to-wit: the 30th day of January, 1909, and having taken appeal from said judgment, present and submit this their joint and several assignment of the errors committed by said court upon and in connection with

the trial of this cause and the judgment and findings and conclusions therein entered, to-wit:

1.

That the Court erred in overruling the pleas to the jurisdiction and in abatement of each of said defendants as set forth in section II of the Original Answer of the Louisiana Western Railroad Company and Section 1 of the First Amended Original Answer of the Texas & New Orleans Railroad Company, respectively, and as shown and for the reasons stated in the defendants' Bill of Exception No. 1 which is hereby referred to and made part hereof.

2.

That the Court erred in overruling and refusing to sustain the general demurrer of each of the said defendants, as set forth in their respective answers on file herein.

3.

That the Court erred to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, in overruling and refusing to sustain the special demurrers of said defendants, set forth and asserted in Section IV-A and Section III-A of the Original Answer and the First Amended Original Answer of said defendants, respectively.

4.

That the Court erred to the prejudice of each of the defendants Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, in and by its judgment and decree and in
94 its conclusions of fact and law, for the reason that there was a fatal variance between the plaintiffs' allegations and the facts proven, in this: that while evidence was introduced by and on behalf of plaintiffs, over the objection of defendants, showing the existence of statutory laws and codes of the State of Louisiana and the construction thereof by the Courts of said State, upon the existence and effect of which the judgment, if any, in favor of plaintiffs must stand, yet there was no pleading on the part of the plaintiffs as to the existence or the effect of such statutes and other laws of the State of Louisiana to justify the admission of the evidence thereof, or to support a judgment on such theory, and therefore the pleadings of plaintiffs do not justify or support the judgment as rendered on the evidence.

5.

That the Court erred to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, in its judgment and decree against them, and in the conclusions of fact and law upon which said judgment is based, in this: that under and by virtue of section 17 of the Act of the Legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, the said corporation was and is exempted from legal liability for the alleged injuries resulting

in the death of William Miller, and such immunity and exemption from liability was a matter of contract between the state of Louisiana and the said corporation, and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé and the Act of the Legislature of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of said State so as to give, or attempt to give and create the right of action asserted by plaintiffs in this cause, would have and did have the effect, if enforcible, of impairing the obligation of such contract and thus would be and was violative of the provisions of the Con-
95 stitution of the State of Louisiana and of the State of Texas and of the United States of America and especially of Section 10, Article I of the Constitution of the U. S. of A.

6.

That the Court erred to the prejudice of the said defendants and each of them, in admitting the testimony of the witness H. P. Dart, over the objections of the defendants, as set forth and for the reasons fully stated in defendants' bill of exception No. 5, referred to and made part hereof.

7.

That the Court erred in admitting the depositions of H. P. Dart, over the objection of the said defendants, as set forth and for the reasons stated in the defendants' Bill of Exception No. 6, which bill is hereby referred to and made part hereof.

8.

That the Court erred to the prejudice of each of the said defendants in admitting, over their objections, the depositions of the witness H. P. Dart, which are set forth in defendants' Bill of Exception No. 7 and for reasons therein stated, which bill is hereby referred to and made part hereof.

9.

That the Court erred to the prejudice of each of the defendants, The Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, in its judgment and decree against them and in its conclusions of fact and law filed in connection with and support of said decree, to the effect that the two defendants "were jointly engaged in the business of operating the said railways as one continuous line from Houston in said Harris County, Texas, to Lafayette in Louisiana, and in so doing used indis-
96 criminately on either the engines, rolling stock, and employés of the other, as the business or convenience required, and each hired for and discharged employés in the said joint business and the employees hired by the one were required to perform and did perform service on the railway of the other; that such employees made continuous runs on trains operated from Houston to Lafayette, and vice versa, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston

and Lafayette over said railways as a continuous route and were partners in such business, sharing in the profits and losses thereof."

And the Court erred in concluding as matter of law that the Texas & New Orleans Railroad Company was jointly liable with the Louisiana Western Railroad Company for the injury and death of the said *William Miller*, and in rendering joint and several judgment against the two defendants accordingly.

10.

That the Court erred to the prejudice of each of the said defendants in rendering its said judgment against them, and especially in that portion of its conclusions of law and fact, being paragraph 2 thereof, to the effect and in substance as follows: that "the employés operating trains over the said railway relied upon the companies to keep the fences in repair and the gates closed to the end that they might not be exposed to the peril of injury or death by the derailment of engines and cars coming in contact with cattle which would otherwise enter upon the right of way and track"; and in finding that the defendants failed to use proper care to keep the gates closed, and that such failure was the proximate cause of the injury and death of Corley Gross for which the defendants were legally liable, and so rendering judgment against these defendants.

11.

That the court erred to the prejudice of both the defendants
97 by rendering its judgment against them, and in its conclusions of fact and law upon which said judgment was based, and especially in that portion of its said conclusions of fact and law being paragraph numbered 4, reading as follows, to-wit:

"I find that some hours previous to the derailment of Gross' locomotive that another of defendants' trains had struck and killed an animal of the cow species near the place of the derailment; and the carcass was allowed to lie upon the right of way within a short distance of a gate in the right of way fence, and that several hours prior to the derailment a number of cattle entered the right of way through the said gate and were seen by employés of defenadnts, in charge of one of defendants' east bound trains, gathered about the dead one, holding a 'ceremony' as expressed by one of the witnesses; that the said cattle were probably attracted upon the right of way by the dead one; and I find that defendants knew or would have known by the exercise of ordinary care of the presence of the dead animal upon the right of way and knew or would have known by the exercise of such care that if the gate was open, *and* that cattle would probably be attracted therein by the dead one or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified the conductor and engineer of the train of that fact, and in time to have had the said cattle removed from the right of way, and I find that it was the duty of defendants and the section men upon the section upon which the said cattle

were, to have removed said cattle or failing so to do to notify said conductor and engineer of the presence of said cattle upon the right of way and that they could have notified them and in that case they and said Gross could have been upon the lookout for said cattle and probably have avoided striking the one which they did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right of way
98 under the circumstances and in failing to remove them from the right of way before the accident, or in not giving the conductor and engineer of the train notice of their presence upon the right of way and that such negligence was the proximate cause of the death of Gross."

And the Court erred in this connection in concluding, as matter of law, that the facts so found, as above quoted, constituted actionable negligence on the part of the defendants, or either of them, and in accordingly rendering judgment against them on such grounds, for the following reasons, to-wit: (1) That there was no pleading in the plaintiffs' petition charging actionable negligence on the part of the defendants, or either of them in leaving the dead animal near the track, whereby other live animals were attracted on to the right of way and whereby the latter became an obstruction causing the wreck, the allegation in the petition, on the contrary, being that the dead or wounded animal itself got upon or was left upon or near the track and itself became an obstruction causing the wreck, and there being no evidence to support this latter allegation as actually made in the pleading; (2) that under the undisputed facts in the case there was no testimony or circumstance of probative force amounting to any evidence that the animal which was encountered and caused the wreck and the death of Corley Gross was one of those animals actually observed inside the right of way fence and near the track by the fireman Reese when he was passing the point of the wreck seven or eight hours prior to its occurrence; and hence the necessary casual relation between the failure to remove the cattle seen by Reese, or notify Gross of their presence at this point, and the wreck itself, is not established by any evidence in the record so as to support and sustain the judgment rendered.

12.

That the Court erred to the prejudice of each of the said defendants in its judgment and decree against them, and in its conclusions of fact and law upon which the judgment is based, as set
99 forth in paragraph numbered 5 of such findings and conclusions reading as follows:

"I find that there is a substantial similarity between the laws of Louisiana and the laws of Texas giving right of action for injuries resulting in death; and that under the law of Louisiana that Gross was not a fellow servant of those whose negligence caused his death and that he did not assume the risk of injury which resulted in his death; and was in the exercise of ordinary care," if for the

reason (1) that there is no pleading on the part of the plaintiffs to justify such finding as a basis for judgment in this cause; and (2) that under the undisputed facts in this case, in so far as same were admissible in evidence to support the plaintiffs' pleading, the injury and death of Gross resulted from risks and dangers of the service open and known to him and of which he assumed the risk.

13.

That the Court erred to the prejudice of both the defendants in rendering the judgment against them, and in its conclusions of fact and law found as a basis of said judgment, in this: that according to the undisputed evidence the deceased was a man of considerable knowledge and experience as a locomotive fireman, being thoroughly familiar with the line of road over which he was operating the engine on this occasion, being familiar with the method of fencing and maintaining gates along the right of way and enclosing the track, having had opportunity and experience prior to such an accident in observing and encountering animals upon the track and within the enclosed right of way at such points as that at which this wreck occurred, and that under the undisputed facts and according to the law applicable thereto the deceased, Corley Gross, had assumed the risk of the accident and injury, and neither of the defendants is liable therefor to the plaintiffs.

14.

That the court erred to the prejudice of the defendant
100 Texas & New Orleans Railroad Company in admitting, over the objection of said defendant, the printed Rule No. 334 offered and read in evidence, for the reason that same was irrelevant and immaterial to any issue in the case so far as said defendant was concerned and was a rule for which so far as the evidence indicated, the defendant was in no wise responsible, all of which actions so complained of are fully set forth in defendants' Bill of Exception No. 2, which is hereby referred to and made part hereof.

15.

That the Court erred to the prejudice of the defendant Texas & New Orleans Railroad Company in admitting in evidence, over its objection, the printed rule No. 420, set forth in the defendants' Bill of Exception No. 3, and for the reasons in said bill of exception set forth, to the effect that the said printed rule was irrelevant and immaterial to any issue in the case involving the said defendant and was not shown to be a rule authorized or promulgated by said defendant or for which it was in any wise responsible, and said Bill of Exception No. 3 is hereby referred to and made part hereof.

16.

That the Court erred to the prejudice of the defendant Texas & New Orleans Railroad Company, in rendering judgment against it jointly with its co-defendant for the reasons: (1)

that at the time of the wreck and injury of the said Corley Gross he was not engaged in the performance of any service on behalf of the said defendant, Texas & New Orleans Railroad Company, nor was then and there an employé of the said defendant: (2) those servants or employés of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs and made the basis of judgment herein were not employés of the defendant Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the principle of re-
101 spondeat superior: (3) that the rules and regulations relied upon in the pleading and introduced in evidence and which are alleged to have been negligently violated, thus causing the injury and death of Miller, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

17.

That the Court erred in its judgment and decree and in that portion of its conclusions of fact and law, being paragraph numbered 2 to the effect that the defendant companies owed a duty of using ordinary care to keep the gates closed, and that the employés operating the trains relied upon the defendant companies to keep the said gates closed so as not to expose them to peril of injury or death by derailment, and that the failure of the defendants to keep such gates closed was negligence on their part proximately causing the injury and death, and rendering judgment accordingly against defendants for the injury and death; for the reason that according to the facts of the case and under the law applicable thereto, the said gates had been placed in the right of way fence for the use and benefit of third parties, and the Louisiana Western Railroad Company acknowledged the duty of said third parties to keep such gates closed and relied upon their doing so, a fact which was understood by the train operatives, and accordingly the failure of the defendant companies to keep said gates closed was not negligence on the part of the defendants, or either of them, rendering them liable for the alleged negligence and death.

18.

That the Court erred to the prejudice of each of said defendants in its judgment and decree against them and in its conclusions of fact and law, as found, upon which said judgment is based,
102 for the reason that according to the undisputed facts in this case there were such dissimilarities between the laws of the state of Louisiana, in which the accident and injury occurred, and the laws of the state of Texas, in which this suit was prosecuted, as to render it impracticable and contrary to the comity between the two states for the courts of Texas to take cognizance of and undertake to determine the controversies involved and to administer and apply the laws of Louisiana, and that such dissimilarities and inconsist-

encies and conflicts between the laws consisted, according to the evidence, especially of the following features and particulars, to-wit:

(1) That the laws of the State of Louisiana in cases in which damages were allowed to parents for injuries resulting in the death of a child, and in which damages were allowed to the children and surviving wife for injuries resulting in the death of a husband, included and embraced in and as part thereof (*a*) the damage decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time that intervened between the accident and his death, for his disfigurement, and for the expenses of his illness: (*b*) the loss or deprivation of the decedent's society and his aid and support, also the expenses of his death and burial; (*c*) damages for mental suffering of the survivors.

(2) That at the time of the occurrences of said injury and death, according to the laws of Louisiana applicable to the controversies involved in this cause, the engineer and fireman (Miller and Gross) were fellow servants, so that the defendant companies were not liable under said law for the death of either of them, in so far as it was the result of negligence on the part of the other.

(3) That according to the provisions of Act No. 21 of the General Assembly of the State of Louisiana for the year, 1878, which created the corporation of the Louisiana Western Railroad
103 Company, the defendants were exempt from liability for the alleged injuries resulting in the death of Miller and Gross:

(4) That at the time of the alleged occurrence in the State of Louisiana and according to the laws of Louisiana applicable to the issues and controversies in this case, the trial and appellate judges had greater power and control over the verdicts of juries than the Judges of the Courts of the State of Texas had or have, and according to the laws of the State of Louisiana nine members of the jury of twelve had the power to render a verdict.

Wherefore defendants aver and submit that the pleas setting up such facts and conditions and dissimilarities of law in bar of the said actions were supported by the evidence and should have been sustained, and the Court should have dismissed said cause or rendered judgment in favor of defendants.

19.

That the Court erred in rendering its judgment and decree herein for the aggregate sum of Six Thousand Dollars, and that said amount is exorbitant and excessive and beyond the amount which the plaintiffs are legally entitled to under the evidence, and that such judgment is the result of the Court applying the laws of Louisiana on the measure of damages, which laws in this respect were introduced in evidence over the objection of defendants, and that it was incompetent and against the policies of the Courts of the State of Texas and against the spirit of comity between two several states for this Court to allow damages herein according to measures of damage existing in the State of Louisiana but which are

not recognized or permitted according to the laws of the State of Texas in such cases.

20.

That the court erred to the prejudice of the said defendants, and each of them, by rendering its judgment and decree herein
104 against them and in its conclusions of fact and law upon which said judgment is based, in this: that the plaintiffs' first amended original petition filed in this cause May 19th, 1908, for the first time alleged "that by the statute law of the state of Louisiana they are given a right of action against defendants and each of them for the damages sustained by them (plaintiffs) by the death of their said son caused by their negligence as aforesaid, which statute is similar to the statute of this state giving parents a right of action for damages for the death of their son as the result of negligence", that such allegation and the cause of action (if any) based thereon constituted a departure in the pleading, from fact to fact and law to law, thus asserted for the first time, and the alleged injury having occurred June 1st, 1905, said action was barred by the statute of limitation of the state of Texas of two years and by the rule and law of prescription of one year of the state of Louisiana. which were duly and specially plead by defendants and each of them in bar of said action, and the court should have so held and accordingly should have entered judgment in favor of the defendants.

LANE, JACKSON, KELLY & WOLTERS,
A. L. JACKSON,
*Attorneys for Defendants and Appellants, Louisiana Western Railroad Company, and Texas & New Orleans Railroad Company.*

Filed March 16, 1909. Henry Albrecht, C. D. C. H. C. By T. W. Browne, Deputy.

105 *Clerk's Cost Bill.*

THE STATE OF TEXAS:

No. 39491.

FELIX & THERESA GROSS, Plaintiff-,
vs.
T. & N. O. R. R. Co. et al., Defendant-.

To Officers of Court, Dr.

Clerk's Costs:

| | |
|---|---|
| Docketing | $ .20 |
| Filing | 4.20 |
| Entering Appearances | .60 |
| Citations | 2.25 |

| | |
|---|---|
| Entering Orders | 4.50 |
| Entering Judgments | 2.50 |
| Swearing witness | .50 |
| Approving Bond | 1.50 |
| Transcript | 69.05 |
| Filing Brief & Cert. | .90 |
| Taxing Costs | .25 |
| Total | 86.45 |

Sheriff's Costs:

| | |
|---|---|
| Serving Citations | $2.25 |
| Jury Fees | .50 |
| Mileage | .25 |
| Total | 3.00 |
| Stenographer's Fee | 3.00 |

*Recapitulation.*

| | |
|---|---|
| Clerk | 86.45 |
| Sheriff | 3.00 |
| Stenographer's Fee | 3.00 |
| Total | $92.45 |
| Paid by Def't 7/17/06 | 23.03 |
| Balance due | $69.40 |

STATE OF TEXAS,
*Harris County:*

I, Henry Albrecht, Clerk District Court in and for Harris County, do hereby certify that the above is a correct bill of all costs incurred in the above numbered and entitled suit up to this date.

In witness whereof, I hereunto affix my hand and seal of the Court at office in Houston, this 30th day of March, 1909.

[SEAL.] HENRY ALBRECHT,
*Clerk District Court, Harris County, Texas,*
By L. W. BROWN, *Deputy.*

106 *Clerk's Certificate.*

THE STATE OF TEXAS,
*County of Harris:*

I, Henry Albrecht, Clerk of the District Court of Harris County, Texas, do hereby certify that the above and foregoing One Hundred and Eleven Pages is a true and correct transcript of all proceedings had in Cause No. 39,491, entitled Felix & Theresa Gross vs. T. &

N. O. R. R. Co. et al., as the same appear on file and of record in my office, with the exception of the Statement of Facts in such cause.

Given under my hand and seal of said Court at office in Houston, Harris County, Texas, this the 31st day of March, A. D. 1909.

[SEAL.] HENRY ALBRECHT,
*Clerk District Court, Harris County, Texas,*
By L. W. BROWN, *Deputy.*

*Statement of Facts.*

In the District Court of Harris County, Texas, 11th Judicial District.

No. 39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

Be it remembered: That upon the trial of the above entitled and numbered cause, before the Honorable Charles E. Ashe, Judge of the 11th Judicial District Court, which occurred on the 30th day of January, 1909, the following facts were adduced in evidence, on the merits, to-wit:

107 WILLIAM REESE, a witness for plaintiffs, having been duly sworn, testified as follows:

My name is William Reese. I reside in Paris, Texas, and have worked for the Texas & New Orleans Railroad Company as a locomotive fireman, both on passenger and freight runs, for a period of 5 years, 8 months and 13 days, during which time my home was in Houston, Texas.

I knew William T. Miller, the deceased, who was a locomotive engineer on the T. & N. O. and also on the Louisiana Western Railway. I remember about the time Mr. Miller was killed and went over that portion of the road upon which his train was wrecked on the evening of the day before the wreck occurred. I was fireman drawing the regular passenger train known as "Second No. 5," running from the direction of New Orleans to Houston, and my train passed Sulphur Mine somewhere in the evening, during daylight. Sulphur Mine is a station on the Louisiana Western Railway, located in the State of Louisiana, about 10 or 15 miles west of Lake Charles and about 27 miles east of Echo. Echo is located in Texas on the west side of the Sabine River. The train that I was on upon this occasion got into Echo very late in the evening; the train that Mr. Miller was on, going east, passed Echo somewhere about 11 o'clock at night.

I am familiar with the point at which this wreck occurred—about 3 miles west of Sulphur Mine. The right of way is enclosed with a fence along by that point. On the evening before this wreck, when I passed this point, I saw cattle within the right of way fence

at this point and I saw a gate open, leading into the right of way at this point, as I passed on my engine. The cattle which I saw on this occasion were about 150 to 200 feet east of this gate. I saw four or five cattle in there, though I don't know exactly how many. I do not believe that prior to that time in running over the road as fireman drawing freight or passenger trains I had ever seen cattle within the right of way fence right at that point, nor do I remember ever seeing this gate open before that time.

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When I passed on this evening, I saw one dead animal at this point, which looked like it had been killed. This dead cow was lying right close to the track and the other cattle which were alive seemed to be holding a kind of ceremony over the one that was dead there. I did not see any other cattle lying down next to the track or close to the track beside the dead one. There were none of the cattle close around where the dead cow was that appeared to be crippled; their physical condition was perfect, so far as I know, excepting the one that was killed. The one that was killed was very close—3 or 4 feet—from the end of the ties, I suppose. I saw it as my train passed by and I could tell from looking at it that it was dead. It had not been dead long, though I did not feel of it and could not tell whether it was warm or cold, and as matter of fact could not say definitely how long that cow had been dead, but these other cattle were around there standing off looking at it.

When we got into Echo that night I did not, nor did my engineer, nor did anybody connected with my train, so far as I know, report the dead cow lying near the track near Sulphur Mine, nor other cattle being on the right of way. My regular engineer at that time was Lon Wilson, but he was not running the engine that evening. A man by the name of Clark, who is supposed to be the traveling engineer, was in the engine with me, and running it, when we passed the point of the wreck.

He (Clark) was in charge of the engine that evening. The traveling engineer (Clark) was supposed to instruct the engineers how to handle the engines—first one thing and another, pertaining to their business in general. He was over all the engineers, having authority over them. I told him (Clark) that cattle were on the right of way. He said nothing to amount to anything; I don't know that he said anything at all. I told him there was a dead cow lying down there; the cow had indications of having been struck by an engine, and apparently that is the way she had been killed. Traveling engineer Clark rode in the engine to Echo.

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There were two stations, Edgerly and Vinton, between Sulphur Mine and Echo, and we stopped at both of them, but he did not get off at either of these places to inform anybody that these cattle were on the right of way. Vinton and Edgerly were both telegraph stations. Clark did not notify anybody at Echo, connected with the company, that these cattle were on the right of way, so far as I know; I did not see him do it, and I know he did not get off of the engine at either of these places. Edgerly is about

4 or 5 miles from Sulphur Mine and we passed there before dark. Vinton is between Edgerly and Echo, about 4 or 5 miles from Edgerly, and both of them were telegraph stations, with telegraph operators at that time. Sulphur Mine, also, was a telegraph station and these cattle were about 3 miles west of Sulphur Mine, and we were going west.

Both the fireman and engineer were killed in this wreck.

There was a section at Sulphur Mine and the section gang made their headquarters there. Sulphur Mine Station was about 2½ or 3 miles East of the point where the wreck occurred. We (Mr. Clark and I) with our engine, had passed Sulphur Mine at the time we saw the cattle, and went on to Edgerly for our next stop, and then stopped at Vinton. The train that we were on comes into Houston, and did so at that time, along about 9 o'clock at night.

Mr. Miller was the engineer in charge of the East bound passenger train on that date, and I believe we met him that night at Amelia. The train he took out was known as the 7:20 train, No. 8. He was pulling No. 8, which left the City of Houston at 7:20 P. M. Amelia is 5 miles west of Beaumont. The engineer in charge of first section No. 5 coming west ahead of me was named Dobbins, and we passed Sulphur Mine — that occasion 10 minutes behind first section No. 5. When we got to Echo I met Dobbins and I told him (Dobbins) that I saw these cattle on the right of way
110 up near Sulphur Mine and that I saw a cow that had been killed.

The train being drawn by Miller's locomotive was due at Sulphur Mine somewhere around 12 o'clock at night and I had passed Sulphur Mine somewhere about between 5 and 6 in the evening while it was still day-light. This was the 1st of June 1905. I came into Houston that night and heard of the wreck and the death of Miller the next morning. At that time my run was a regular passenger run between Houston and La Fayette. I worked for the T. & N. O. Railroad Company; was employed to work for the T. & N. O. and to run between Houston and La Fayette, that is, Houston, Texas, and La Fayette, Louisiana. The Southern Pacific Railroad Company, I suppose paid me. I drew my checks from the T. & N. O. My employment involved the necessity of working over the T. & N. O. and the Louisiana Western from Houston as far as La Fayette, La., and from La Fayette back to Houston over the same road. I was under W. S. Cox, Division Superintendent, and J. J. Ryan was master mechanic. Cox's headquarters were in Houston in the fifth ward. I got the engine that I fired upon from the round-house in the fifth ward at Houston. This engine did not stop at the terminus of the T. & N. O. at the Sabine River, but went on to La Fayette. The engines did not run by name, but by numbers. Some had L. W. on them; some, T. & N. O.; some G. H. & S. A.; and some M. L. & T.. M. L. & T. means Morgan's Louisiana and Texas. And some had S. P. on them. These engines, indiscriminately, were used between Houston and La Fayette. The Louisiana Western is just a division of the company. The M. L. & T. division is from La Fayette to New Orleans. The first divis-

ion of this S. P. system between Houston and New Orleans towards the east was T. & N. O. At the time of this injury this division extended to Echo. The next division started at Echo and went to La Fayette. This was the L. W.—was the Louisiana Western.

I suppose that Miller's run was the same as mine—from Houston to La Fayette. I met him over there frequently. My lay-off
111 was at Houston and at La Fayette. In going from Houston to La Fayette on passenger runs we got fuel for the engine at Houston and Lake Charles, and in coming back, at the same places. La Fayette was the fuel supply and I got more at Lake Charles; and in going out from Houston we would get fuel at Houston and what we would get here would run us into Louisiana, and the fuel we would get at La Fayette would run us into Houston.

Mr. Cox was division superintendent between Houston and La Fayette at that time. We were not supposed to make reports to anybody else but Mr. Cox. My engineer reported to him. The whole train that I was with from Houston ran through to La Fayette with the same crew in charge. All the supplies necessary to run that train, including lubricating oil, fuel oil, and everything, were supplied right here in Houston; and over in Louisiana we got fuel at Lake Charles and fuel and supplies of all kinds at La Fayette.

On cross-examination the witness testified:

I was locomotive fireman, regularly drawing passenger trains between Houston and La Fayette for a couple of years and up to the time of retirement after the death of Miller. I continued after Miller's death until the 15th day of November, 1905, since which time I have not been employed by the Texas & New Orleans Railroad Company, nor operated on that line. I have no full or detailed knowledge as to the arrangements between the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, nor personal knowledge of such matters. The only knowledge I have in this respect is from being employed by and working for them. I do not know, personally, how their affairs were managed in general.

I stated on direct examination that I got my pay from the Texas & New Orleans Railroad Company, but it is a fact that after a certain time, somewhere in 1904, they cut the division at Echo, and since the year 1904 and during the year 1905, and up to the time I quit the service, I got pay for my services on the Louisiana Western Railroad from the Louisiana Western Railroad Company
112 and got a separate check for this service and signed for it and collected it; and got a separate check from the Texas & New Orleans Railroad Company for services this side of the Sabine River and extending from that point to Houston. So far as I observed, the engineers and firemen that worked on this same run have gotten their pay in the same manner as I did, since 1904. Sometimes for convenience I would receive my checks from the Louisiana Western Railway Company at Houston, if I did not happen to be out in Louisiana,—that was a matter of convenience. During the time that I ran as a fireman over the Louisiana Western Railroad I do not remember to have seen cattle inside of the right of way at the

point of this wreck. They might have been there at nights or even in the day-time, without my noticing them, and they might have been in there frequently at intervals when others were passing over the line, without my seeing them.

When I passed by the point at which the wreck afterwards occurred, I saw one head of stock dead and the others seemed to be looking at it. I am familiar with the private crossings equipped with gates on the road in Louisiana. I don't remember whether there were any of these private crossings between Sulphur Mine and the state line of Louisiana and Texas, excepting this one, or not, but there is quite a number of them east of Sulphur Mine and between that point and La Fayette, Louisiana.

During the time that I was working there over the Louisiana Western Railroad, and up to the time of the death of Mr. Miller, the engine that I was on several times struck stock between the state line of Louisiana and Texas and La Fayette, La., but never at this particular point of the wreck. Several times during that period and between those points, we had stock accidents, but this was generally at public crossings or station grounds, where the right of way was not fenced. I do not remember to have had any accidents inside the right of way fence. I did not have anything to do with
113 the making of stock reports, but the engineer had blanks supplied for this purpose and would make out a report of stock injured or killed. This was the custom and practice of the service; the engineer would turn in these stock reports to the master mechanic.

W. S. Cox is the man who employed me. After a certain time, beginning with the year 1904, as above stated, I received pay from the T. & N. O. Railroad company by its checks for the service performed in the State of Texas, and from the Louisiana Western Railroad Company for the services performed in Louisiana, but they never did, during the time of my service, stop the passenger trains at the Texas and Louisiana line except during the yellow fever in 1905, and did so at this time on account of the quarantine, but during the time of my employment the freight crew never went any further than the state line.

I know nothing about the paper division of money in the way of checks. The passenger trains coming from La Fayette, towards Houston did not change crews at the state line except during the yellow fever, nor alter their arrangements as to fuel oil and other supplies above stated by me.

They had the right of way fenced up in Louisiana to keep cattle from getting on the track, I suppose. They were pretty strict generally in keeping them in repair. The fences used were barbed wire fences, with 5 or 6 wires. They were supposed to be sufficient to turn cattle. The fences had gates in them which were sufficient to turn cattle if they were not left open. My idea is that the stock which got into the right of way fence came through open gates. These gates were put in the right of way fence as private crossings, so that outside and private people who owned farms on either side might go across. These gates were not put in there for the use of

railroad people, but for the private people living on either side.
They owned big farms on either side and if they wanted to
114 go to the other side of the right of way they would open
these gates and go through the private crossing. These gates were in the right of way fence and when closed constituted part of the line of fence of the railroad company.

I think that on the occasion when I passed and saw these cattle it was about the only time I ever saw this gate open. I saw no keeper at this gate. I made these trips over this portion of the road about 21 or 22 days a month during a period of about 5½ years.

At the time when Mr. Miller was killed the freight engines from Houston stopped at Echo. That grew out of the fact that the freight schedules were slower than the passengers. They used the same engines all the time on the passengers. Passenger engines went from Houston to New Orleans and did not stop at La Fayette. But the crews on the freight trains stopped at Echo and another crew would take charge of the freight trains at Echo and go through to La Fayette. The engineer, fireman and other members of the train crew on freights would change at Echo at the time when Mr. Miller was killed.

On recross-examination he testified:

It is a fact from my experience as a railroad man that the flat cars, stock cars, and box cars of various railroad companies are frequently off the lines of those companies that own them, and frequently, for example, the cars of the T. & N. O. Railroad Company are beyond the State of Texas and on the lines of other companies and upon the railroads of other companies that are in no way connected with the Texas & New Orleans Railroad Company. This is — result of ordinary traffic, and I suppose the railroad companies have a process and method of accounting for these things and charging them up against each other so as to bring about a final adjustment. I do not know whether the Louisiana Western Railway
Company owned any rolling stock at all outside of her
115 engines. Their line runs from Sabine River, or Echo, only to La Fayette, as I understand. I saw lots of the cars marked L. W. and saw them at the time of Miller's death. At and prior to the time of Miller's death the same engines would be run from Houston, Texas, to La Fayette, Louisiana, and prior to and up to that time they would use the fuel and other supplies gotten in one state to run the engine into the other.

It was here agreed, as a fact, that William T. Miller, deceased, was on the locomotive engine which was drawing passenger train No. 8, going east, on the occasion of the alleged wreck; and that Corley Gross was the fireman on said engine; that this engine was derailed at a point west of Sulphur Mine, in the State of Louisiana, on the 1st day of June, 1905, and that William T. Miller and Corley Gross received injuries in said wreck which resulted in their deaths, and that such derailment and wreck occurred on the railroad of the Louisiana Western Railroad Company, one of the defendants in this case.

JOHN B. LONG, having been duly sworn as a witness for plaintiffs, testified as follows:

I was a passenger on passenger train No. 8 on June 1st, 1905, going from Houston to New Orleans, when a wreck occurred and the engine left the track west of and near Sulphur Mine, in the state of Louisiana. This point was about 2 miles west of Sulphur Mine station. William T. Miller was the engineer pulling the train and Corley Gross was the fireman. I was in the rear sleeper, occupying berth No. 10, and had gone to bed.

My attention was first called to the fact of the wreck by some one passing through the sleeper, calling out that we were in a wreck and that the engine had turned over. Something to that effect.

I immediately got up and I pulled my vest out from under
116 the pillow to see what time it was, and it was 11.45 p. m. I do not remember exactly what time the train left Houston that night. I got up immediately and partly dressed and walked through the head sleeper—I was in the rear sleeper—and walked through the head sleeper and through the 2 coaches and to the front end of the first car, which was against the express or baggage car, and seemed to have *k*areened towards the south; and I could not get out of that door, so I turned back and walked to the platform between the first and second coach, and I got out on the south side; and in endeavoring to get to the front end I was stopped on account of the coaches extending towards the slough or swamp there, full of water, and I then turned back and crossed back over the platform and in going along the north side, when I got up about half way between the front of the rear end of the second coach, I was crawling on my hands and knees, and put my hands on this warm animal that was lying on the track directly under the coach. It was dead and had been dragged some distance from the west, going east, and it was lying then north on top of what was the original road bed; it was warm and was a large animal. I was there where the animal had been dragged on the gravel, where the animal had been dragged in some manner under the engine and coaches.

I saw Mr. Miller and when I saw him he was still living; he was walking with the assistance of some of the passengers; they were taking him back, and as well as I can remember, he was about in the front end of the sleeping car, where the long seat is. Fireman Gross, also was still living. I understand that they both died shortly afterwards. When I saw Mr. Miller he appeared to be suffering some—not a great deal, but seemed to be very buoyant. He was being assisted by somebody whom I did not know, and I did not know
117 how badly he was hurt.

Mr. Gross, the fireman, came along first; he was walking by himself, and I asked him,—not knowing who he was, not knowing whether he was the fireman or engineer,—I asked him if I could assist him, and he said something about getting the engineer, or looking for the engineer, or something to that effect. I never heard neither one of them say what they had run over, and I heard neither one of them say anything about being scalded or burned, or what they were suffering from; nor did I ask them.

On cross-examination the witness testified:

We stayed there at the wreck until about daylight. The relief train came a little before we left, and I understand it took these men away.

I did afterwards observe another animal there in the vicinity of the wreck besides the large one I heretofore mentioned. After the engineer and fireman were placed on the train I crossed over on the south side and walked west. I crossed over on the platform of the passenger coach, to the south side, and walked west and when I got about 100 feet, or probably 125 feet, from where this animal was lying and partly under the coach on the south side of the track, I found a large yearling that was badly bloated and cold, lying some 7 or 8 or 10 feet from the track on the south side, and it had been dead apparently 36 to 48 hours; it was bloated, and was probably 10 or 12 feet, or a little more, from the south side of the track. There was no wreckage about it. It had been struck by a west bound train, and I say it had been struck by a west bound train from the posture the animal was lying in, and also the ground showed it had been that way. This yearling was somewhere about on the south side of the track where the rear end of the rear sleeper, or the last car of the train stood. The cars that were by the yearling were still on the track; all the coaches, both sleepers, the first class and a part of the second class coach, were on their trucks; they were on
118 the rails; the head coach was not on the rails, but the second coach from it was on the rails. I think the rear trucks, and the other cars were all on the track, including the two sleepers. I suppose it was a distance of 200 or 250 feet from the location of this yearling up eastward to the wreckage. There was no indication that any portion of this train had come in contact with the yearling; it could not have been so; the yearling was lying down about 15 feet from the end of the ties on the south side of the track.

I am connected with the Southern Pacific Company, in the position of inspector or chief officer of the detective department.

Mrs. FANNIE L. MILLER, the plaintiff, being duly sworn, testified on her own behalf, as follows:

I married Mr. William T. Miller in the year 1890. As a result of our marriage I have three living children. One of them is George W., who is very near 13 years old; one of them is William D., who was 9 years old in November; and Dorrace, a girl, who is six years old. Mr. Miller's earning capacity at the time he was hurt was between $175 and $200; it averaged upwards of $175; I do not remember at any time for a year he had not drawn over $175 at any time; he generally drew $190; what he was drawing regularly was $190.00.

During all the time of our married life he was very affectionate; just as affectionate as could be; he spent his entire time at home. He had no bad drinking habits; he was temperate, and did not use even tobacco nor beverage of any kind whatever. He was 41 years old a few days before he was killed. His health was as fine as could be;

didn't know what it was to have an ache or a pain or suffer of sickness of any kind, and I never did know him to be sick in our whole married life,—at times he would get a little bilious and take
119 a little medicine and lay off, but never in bed. He worked steadily and seldom missed a run. His weight was 250 pounds; he was 5 ft. 10 inches high. He was a very active man. His earnings each month he gave to me, the whole amount except his expenses; he gave me his entire wages and as he needed it he came to me and I gave it to him; his expenses on the road amounted to about $16. and not over $18. a month.

He was working for the Southern Pacific at the time of his death. He ran from Houston to La Fayette. He had been on that line, both as freight and passenger engineer, 19 years; he had not been on a passenger run very long regularly, but he had been an extra passenger man for years, and had been on the regular local for years, but not very long on a regular passenger run, very nearly a year. He had accepted at the time of his death his turn as a regular passenger man.

He took a great deal of interest in the children, rearing them, and spending his entire time at home, training and rearing them. Every day of his life, when he was at home, he expressed himself as to the interest he felt in properly raising his children. He did everything he could around the house to assist me in a general way, about housekeeping and in cooking and in doing everything like that, repairing the house, everything like that. He never spent an hour away from home, assisted me in making fires; the entire care of the children was on him when he was at home; I did not have the care of them at all. We always made our purchases in town together; he was always willing to advise and counsel with me. Was very amiable; I never saw him angry in my life; stayed right at home; I do not know whether he knew how to play cards; he never spent one hour away from home when he was off the road. I was 42 years old at the time of his death.

He died at 8:20 and I reached him at 12:30 the next day; brought him to Houston and buried him.

120 On cross examination the witness testified:

After the death of William T. Miller, the Louisiana Western Railway Company paid me something that was due him. I won't be sure whether it was the Louisiana Western or the T. & N. O., I know the T. & N. O. paid me.

In this connection a check made out by the Louisiana Western Railway Company, in the sum of $4.00, and another one made out by the auditor of the same company, for $76.45, drawn on the treasurer of said company, being exhibited to the witness, she recognized and identified her signature on said instruments, showing the receipt of the sums mentioned and the payment thereof, and also identified her signature to a bond given to indemnify the Louisiana Western Railway Company against loss on account of the payment without administration on her husband's estate.

And in this connection the witness also identified the signature of her husband, William T. Miller, as affixed to and endorsed on a check to him from the Louisiana Western Railroad Company for wages due him on account of services upon that company's railroad during the month of April, 1905.

In connection with the testimony of the witness Mrs. Fannie L. Miller, and as part of her testimony on cross examination, defendants offered and introduced in evidence the following documents identified by her, to-wit:

1. A check reading as follows:

Louisiana Western Railroad Company.

Auditor's Office. Check No. 234.

NEW ORLEANS, LA., *April 30th*, 1905.

Treasurer Louisiana Western Railroad Company, New Orleans, La.:

Pay to the Order of W. Miller $72# Seventy Two# Dol-
121 lars, In full, for Services rendered to Louisiana Western Railroad Company, during the month of April, 1905 on presentation of this Check, properly endorsed by the payee, when countersigned by J. G. White.

(Signed) T. O. EDWARDS, *Auditor.*

Countersigned:

J. G. WHITE.

Payable at option of the holder at the New Orleans National Bank, or the Citizens Bank of Louisiana, New Orleans, La.

Upon the face of this is stamped:

"Treasurer's Office. Paid May 24, 1905."

Upon this appears endorsed the name of W. Miller and of L. Domengeous, the name of W. Miller having been theretofore identified by the witness Fannie L. Miller as the signature of her husband.

2. A check of the Louisiana Western Railroad Company, drawn by its Auditor on the treasurer of said company, in favor of W Miller, reading as follows:

Louisiana Western Railroad Company. Check
Auditor's Office. No. 260.

NEW ORLEANS, LA., *May 31st*, 1905.

Treasurer Louisiana Western Railroad Company, New Orleans, La.:

Pay to the order of W. Miller $76.45 Seventy six & 45/100 Dollars, In Full, for Services rendered to Louisiana Western Railroad Company, during the month of May, 1905 on presentation of this

Check, properly endorsed by the payee, when countersigned by J. G. White.

(Signed) T. O. EDWARDS, *Auditor.*

Countersigned:

J. G. WHITE.

Payable at option of the holder at the New Orleans National Bank or the Citizens Bank of Louisiana, New Orleans, La.

122 This is stamped on the face "Paid," and bears endorsed upon it the name, Mrs. Fannie Miller, which was identified by her while a witness, as her signature.

3. A check of the Louisiana Western Railroad Company in favor of W. Miller, for the sum of $4.00, reading as follows:

| Time Voucher No. 5421. | Louisiana Western Railroad Company. Auditor's Office. | Check No. 55. |
|---|---|---|

June 1905. NEW ORLEANS, LA., *June 29th*, 1905. $4.00.

Treasurer Louisiana Western Railroad Company, New Orleans, La.:

Pay to the order of W Miller Four Dollars For amount due a/c services as Engineer in June 1905.

(Signed) T. O. EDWARDS.
CHAS. E. WERMUTH, *Auditor.*

Payable on Presentation of this Check, endorsed by him, and countersigned by J. G. White.

Countersigned:

J. G. WHITE.

This is stamped on the face of it "Paid" July 10, 1905, (signed) John B. Richardson, Treasurer, and bears as an endorsement the name of Mrs. Fannie Miller, which was identified by her while a witness, as her signature.

4. An indemnity bond executed by Mrs. Fannie L. Miller and J. H. Harral and Robert L. Jones, as sureties, identified by the witness Fannie L. Miller, having been given as indemnity to secure the payment to her of the checks dated May 31st and June 29th, respectively, above described, the bond reading in full as follows:

*"Indemnity Bond for Pay of Deceased W. Miller.*

Know all men by these presents: That Mrs. Fannie Miller
123 of Houston, Texas, as Principal, and J. H. Harral, Rob't L. Jones of Houston, Texas, Sureties, are held and firmly bound unto the Louisiana Western Railway Company, in the sum of Eighty and 45-100 Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our representatives, heirs and assigns firmly by these presents.

Signed and sealed this 7th day of July, A. D., 1905.

The condition of the above obligation is such that Whereas, the Said Mrs. Fannie Miller has represented to the said Louisiana Western Railway Company that W. Miller died intestate, on the 1st day of June 1905, and was at the time of his death indebted to no person whatsoever, and has further represented that said Mrs. Fannie Miller is (or are) the sole heirs at law and entitled to letters of administration on the estate of W. Miller

And Whereas, At the time of this death, the said W. Miller was in the service of the said Louisiana Western Railway Company, and there was and is due to him from said Louisiana Western Railway Company the sum of Eighty and 45/100 Dollars for services rendered during the months of June & May, 1905.

And, Whereas, the said Mrs. Fannie Miller has applied to the said Louisiana Western Railway Company for the payment of the said sum so due as aforesaid without the issuance of letters of administration.

And, Whereas, Said Louisiana Western Railway Company is willing to make such payment on condition of being indemnified, and has this day paid said amount to said Mrs. Fannie Miller, the receipt whereof is hereby acknowledged.

Now, Therefore, If the said Principal herein shall indemnify and save harmless The Louisiana Western Railway Company, and its successors, and shall pay all damages, costs and expenses of every nature whatsoever, including court costs and attorney's fees,
124 which it, or its successors, may suffer by reason of the payment so as aforesaid made to the said Mrs. Fannie Miller, then this obligation shall be void; otherwise of full force and effect.

(Signed) MRS. FANNIE MILLER.
J. H. JARRAL.
ROB'T L. JONES.

Witness:

P. S. HOGAN.

T. E. CARDINELL, a witness for the plaintiffs, having been duly sworn, testified as follows:

About the 13th day of July, 1905, and after the wreck near Sulphur Mine on the Louisiana Western Railroad, I went over to the scene of the wreck and made some measurements, and after returning I made some memoranda of what I observed there. The point that I went to was two or three miles west of Sulphur Mine. I found some marks on the ties where an engine had apparently left the rails. She left 126 feet from where the gates were,—the gates where the road crosses, that would be west of the gates toward Houston from the road crossing to where she went off on the ties,—would be 126 feet by tape line. Where she struck the ties was 126 feet east of the gates. Those marks were on the ties, caused by the trucks of the engine where she dropped off the rails. It was 480 feet from this crossing to where she went over into the ditch, measured with a tape line, and was east of the crossing. The marks on the ties ceased at that point, that is, 480 feet east of the

crossing, and there she turned over and laid on her side, where sh
had been.

I saw loose ties there on the right of way where she had been
They were rotten. There were 89 new ties put in the track and th
old ties were piled up; I did not count them, they were stacked u
there; the number of new ties that had been put in and the number o
the rotten ones piled up were something similar. The new tie
125 were put in from where the engine left the track to where th
engine went off at different intervals. They were put in differ
ent places and somewhere close to where the engine left the track
There were marks on the ties that had been taken out of the track
The ties that had been taken out of the track were piled up.
did not examine them to see whether they had marks on them or not
they were old rotten ties; they were all broken; just as rotten a
they could be; I examined them; they were quite rotten.

I had been a railroad man for a good many years, about 27 years
I had run over that road a good many years. The usual effect of a
engine striking an animal on the track where ties underneath wer
rotten, according to my experience depends on how you will strik
the animal. If the animal went under the engine, the engine woul
roll like this and probably leave the track; if she left the track
there would be nothing to put her on unless she would run to a side
track or frog, or something; she might throw herself back on if i
was a side track or switch or something, she might accident-ly ge
back on,—I have known them to get back on at times. They don'
often hop off and hop on again. When an engine is off the track th
ties usually strike where it is filled in the center of the road and sh
jumps those ties and it throws the trucks either one way or th
other and those trucks will slew like this and they will strike the rai
and strike what they call the fish plate and over she will go
Whether she will go over immediately is according to the speed. Th
rotten ties will break right in t-o; she would cut them in t-o; th
weight of the engine would cut them ties in t-o and she would g
down and up like this; the trucks set like a beam there and they
will whirl around, they set on a pivot like that, there is a bolt tha
runs up in the truck that holds them and the pin goes up and they
set down on that with a regular little bit with a circle a little above i
and the truck if she is on a rotten tie the weight cuts that tie in t-
and she goes into the earth and if she strikes a good tie she woul
bounce up. As a general proposition the decayed ties could
126 not help the situation any. They would tear up the earth and
everything before it. The rotten ties certainly would tea
up the track and the track would separate and away she would go.

I knew Mr. Miller in his lifetime; he was a man of first-class
habits; his health was apparently good and he was a robust man
about 41 years old. He was a man very affectionate to his family
and was a first-class engineer, one who could always get work. His
wages as engineer were all the way from $125 to $200, sometimes
more and sometimes less.

I have seen engines of the Louisiana Western Railroad Company
with its name on them on the Southern Pacific track, that is on the

T. & N. O. track. I ran them through from Houston to La Fayette, La. I was on this run 11 or 12 years, which was about 9 years before the accident. I have seen them on that road recently.

On cross-examination the witness testified:

It was about the 13th of July, 1905, when I went over to the point where this wreck had occurred. Prior to this time of going there I hadn't been there for a long time before the wreck. I do not know anything of the condition prior to the time of the wreck except from what I saw there on the 13th of July, 1905, which was about a month and a half after the wreck. Mrs. Miller asked me when I went to Lake Charles to examine the track and I told her I would do it for her. I got my expense money from her to go over there, but received nothing else than expense money. My work has been that of an engineer; I used to work on a section one time in 1864, but had never worked on this railroad.

I did not examine the pile of ties any more than to see they were rotten; I looked them over and picked them apart; they were all rotten; they were all shattered down, probably there would be a crust on some of them, probably two or three inches that was not rotten through and through. I mean to say they were ties
127 that ought to have been taken out a long time before they were; they were rotten. I had no opportunity to see the track as it stood before the time of the wreck.

On my part, I did not leave the railroad company in an unfriendly mood, I had nothing against them. My feelings were good toward the company, but not toward a couple of the officials who were connected with the engineering department here in Houston.

On re-direct examination, the witness testified:

The ordinary distance between the ties in a track is between a foot and a half and two feet, and the tie is about 8 or 10 inches across, some more and some less; this would make about two feet from one tie to the other.

The plaintiffs next offered and introduced in evidence Rule numbered 334, contained in a printed Book of Rules and regulations, purporting to have been printed and issued under the authority of the "Morgan's Louisiana and Texas Railroad and Steamship Company and Louisiana Western Railroad Company," as a revised edition issued September 1st, 1902, and which was admitted to have been in force at the time of the injury and death of William Miller and Corley Gross, and copies of which had been furnished them and with which they were familiar.

Said Rule No. 334 reads as follows:

"334. It is the duty of every employé, regardless of department, to report defects in road or bridges, or obstructions of any kind, to the Superintendent, and, if possible, to the nearest section or bridge foreman. When necessary, flags and torpedoes must be left to notify approaching trains; and when there is any reason to believe that the safety of the track or of any structure is endangered by flood, fire

or other causes, any employé, before attempting its use, must
128 make a personal inspection, using all precautions in the interest of life and property."

The plaintiffs offered and introduced in evidence printed rule No. 420 in the above mentioned book of rules, issued by the Morgan's Louisiana & Texas Railroad and Steamship Company and the Louisiana Western Railroad Company, which Rule 420 reads as follows:

"420. The track must be kept clear; and it is the duty of foremen to turn out promptly with all their men and remove any obstruction, whenever notified by trainmen or others, even though the obstruction may not be on their sections. If notified of broken rails on an adjoining section they must at once make track safe for trains. Anything that interferes with the safe passage of trains at full speed is an obstruction."

FELIX GROSS and THERESA GROSS, having been duly sworn, each testified on behalf of plaintiffs substantially to the following effect: That they were husband and wife and parents of the deceased, Corley Gross; that Felix Gross at the time of the trial was 65 years old and Theresa Gross was 56 years old; that Corley Gross, the deceased, at the time of his death was 23 years of age; he was of good health and strength, sober and industrious and a dutiful son, and at the time of his death was in the employment of the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, as a fireman on locomotives drawing passenger trains running between Houston, in Harris County, Texas, over the Texas & New Orleans Railroad to the state boundary, and from that point over the Louisiana Western Railway to La Fayette, in the State of Louisiana, and that prior to his death he was earning an average
129 of $90.00 per month, the usual wages paid fireman for similar services; that at and prior to the time of his death Corley Gross resided with his parents in Harris County, Texas, and that his parents resided in and now reside in said County and state; that the said Corley Gross while serving as such fireman on a locomotive drawing a passenger train running from Houston to La Fayette, was killed in a derailment of the engine near Sulphur Mine, on the railway of defendant Louisiana Western Railroad Company, on or about June 1st, 1905, William T. Miller, engineer of said locomotive, losing his life in said wreck at the same time and place; that about two months after the death of the said Corley Gross Felix Gross, his father fell from the roof of a house and broke his right wrist and right ankle, and the latter's ability to labor since said time has been much impaired, that otherwise he is in good health and strength; that Theresa Gross is in good health and strength; that the said Felix and Theresa Gross are without means of support other than that derived from their labor, and that they were dependent upon their said son for pecuniary aid, and that their said son, Corley Gross, gave his wages to his parents to be used by them for their support and maintenance, and they did use the same for such purpose, except about $15.00 per month which he used for his own benefit; that the said Corley Gross often declared his purpose

to contribute of his earnings to the support and maintenance of his parents so long as they, or either of them, should live.

In connection with the testimony of the witnesses Felix and Theresa Gross, as part thereof, the defendants introduced in evidence a check drawn by the Louisiana Western Railroad Company upon its treasurer, in favor of C. Gross, for the sum of $38.52, in full for services to Louisiana Western Railroad Company during the month of April, 1905, which it is agreed was endorsed by the said Corley Gross and collected during his lifetime, and which, according to its face and with the endorsements thereon, reads as follows:

130 Louisiana Western Railroad Company.

Auditor's Office. Check No. 279.

NEW ORLEANS, LA., *April 30th*, 1905.

Treasurer Louisiana Western Railroad Company, New Orleans, La.:

Pay to the Order of C. Gross, $38.52 Thirty Eight & 52/100, Dollars, In full, for Services rendered to Louisiana Western Railroad Company, during the month of April, 1905, on presentation of this Check, properly endorsed by the payee, when countersigned by J. G. White.

(Signed) T. O. EDWARDS,
*Auditor.*

Countersigned:
J. G. WHITE.

Payable at option of the holder at the New Orleans National Bank, or the Citizens Bank of Louisiana, New Orleans, La.

Endorsements as follows: "C. Gross. Pay Bank of Lafayette, La Fayette, La., or Order. Pellerin Bros. Pay to the order of Any Bank, Banker, Bankers, or Trust Company. Bank of Lafayette, La Fayette, La. J. J. Davidson, Cashier. Through N. O. Clearing House. Endorsements Guaranteed. May 22, 1905. Louisiana Nat'l Bank."

In this connection, also, the defendants introduced a similar check to that last above described in the sum of $40.91 payable to the order of C. Gross, in full for his services rendered to the Louisiana Western Railroad Company during the month of May, 1905, and drawn by said Company; and a similar check payable to the order of said C. Gross, in the sum of $2.14, in full for his services rendered to the Louisiana Western Railroad Company during the month of June, 1905, both of which last mentioned checks, it is agreed,
131 were paid to the plaintiff, Felix Gross, after the death of the said Corley Gross; and in connection with the last two checks above described the defendants also introduced an indemnity bond, signed by Felix Gross and the sureties, which reads as follows:

*"Indemnity Bond for Pay of Deceased, C. Gross.*

Know all men by these presents: That Mr. Feolix and Tracey Gross of Houston, Tex., as Principal-, and R. H. Fonville, J. C. Silvey of Houston, Tex., Sureties, are held and firmly bound unto the Louisiana Western R. R. Company, in the sum of Two and 14/100 Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our representatives, heirs and assigns firmly by these presents.

Signed and sealed this 24 day of July, A. D., 1905.

The condition of the above obligation is such that Whereas, The said Felix and Tracey Gross *has* represented to the said Louisiana Western R. R. Company, that C. Gross died intestate, on the 3d day of June, 1905, and was at the time of his death indebted to no person whatsoever and has further represented that said Felix and Tracey Gross *is* (or are) the sole heirs at law and entitled to letters of administration on the estate of C. Gross.

And Whereas, At the time of his death the said C. Gross was in the service of the said Louisiana Western R. R. Company, and there was and is due to him from said Louisiana Western R. R. Company, the sum of Two and 14/100 Dollars, for services rendered during the month of June, 1905.

And, whereas, Said Louisiana Western R. R. Company is willing to make such payment on condition of being indemnified, and has this day paid said amount to said Felix and Tracey Gross, the receipt whereof is hereby acknowledged.

Now, Therefore, If the said Principal- herein shall indemnify and save harmless the Louisiana Western R. R. Company, and its
132 successors, and shall pay all damages, costs and expenses of every nature whatsoever, including court costs and attorney's fees which it, or its successors, may suffer by reason of the payment so as aforesaid made to the said Felix and Tracey Gross, then this obligation shall be void; otherwise of full force and effect.

(Signed) FELIX GROSS.
TRACEY GROSS.
R. H. FONVILLE.
S. S. MASSENGILL.

Witness:
J. C. SILVEY."

Plaintiffs here rest.

*Defendants' Testimony.*

J. A. SOBER, a witness for defendants, being duly sworn, testified as follows:

My name is J. A. Sober, and I reside at Sulphur, Louisiana, and have resided there since the year 1901, during which period I have been Manager of the Houston River Canal Company, Limited; my office is right at Sulphur Mine Station.

I recall the occurrence of a derailment and wreck near Sulphur

Mine on the 1st of June, 1905, in which engineer Miller and fireman Gross were killed. I was at home in my bed that night when the wreck occurred; I got up very early the next morning and went to the scene of the accident, arriving there about half past 6 o'clock in the morning. The passengers were still there at the scene of the wreck when I arrived. The place where the cars were wrecked was within about a quarter of a mile of the lands of the Houston River Canal Company, Limited, which I had charge of; the premises
133 adjoining the lands of the Houston River Canal Company were owned by the Union Sulphur Company; this latter company owned about 5 sections of land lying out on both the south side and north side of the railroad, and the Houston River Canal Company owned about the same quantity, which was enclosed and located also both on the south and north side of the railroad track.

At the place of the wreck there is a gate in the right of way fence on each side of the track, the right of way being enclosed with a fence on each side. Those gates were built there in the right of way fences for the benefit of my company and the public in general, so that we could cross with our rice to bring it to the station so that we could get from one side of the track to the other. Besides ourselves crossing there, there were people who worked in the mines of the Union Sulphur Company and lived on the south side of the railroad, who also crossed back and forth, they crossed there, and further than those people and ourselves I do not think anybody had any particular use of the gates. So far as I know the railroad employés had no occasion to use these gates. For the purpose of fastening them, these gates had a kind of a slot, it was a stick, I think, about 3½ feet long, I think, they call it a latch, which slips through into a slot made in the post on the other side; there was no difficulty in shutting the gates; the gate had a balance on the back end that made it very easy to swing. I had been warned by the section foreman to always keep the gates shut and as they were put there for my company I made special effort to see that they were kept shut; when I went through I shut them, but I found them left open by others many times.

Prior to the occurrence of this wreck I had seen stock inside the right of way fences many a time.

When I went down to the scene of the wreck in the early morning after it occurred, I found quite a wreck. I found the engine was thrown from the track and that the tender had reversed itself, turned
a somersault, and two or three cars were completely off the
134 track.

I am familiar with the crossing and the surroundings as they were at that time and have been familiar with them several years. I have prepared a plat—the one now shown to me—and identified by me—which indicates substantially the railroad track, the crossing, the two gates, the directions of the compass, the lands of the Houston River Canal Company and the Sulphur Mine company, and the right of way fences and the timber and woodlands lying outside of the right of way fences, also indicating the location

of the mine on the north side of the track, and Sulphur Mine Station itself, lying on the railroad to the east of the point of the wreck.

On cross examination, the witness testified.

I am President and Manager of the Houston River Canal Company, Limited, which is a rice company, and was in that position at the time of this wreck. I did not construct these gates, the railroad company put them there; the gates are in their right of way fences. I suppose that they knew these gates were being used by the public as they put them there for that purpose. The section foreman was constantly cautioning me to keep the gates shut; the reason of his so cautioning me was that they were being left open and he knew this. The railroad people did not keep any watchman there at the gates that I know of, and I think I would have known if they had. The extent of their precaution as to those gates, so far as I know, was to notify me from time to time about keeping them shut.

The woods indicated on the plat are fairly thick on the south; the right of way was clear, but outside of the right of way the land was covered with wood and thick undergrowth. If cattle were ranging around in those woods you could not see them; in passing along they would have to be practically on the right of
135 way to see them. The woodland country there is grassy to some extent and the cattle would go there to get that grass. As a general thing they would range around in the woods away from the right of way, feeding and grazing, and thus would be hidden from people going along on the train.

I have seen the section men there running cattle out of the right of way and have put them out myself from time to time and have closed the gates; I have seen cattle right on the right of way and in the woods. I had seen cattle there on the right of way as much as twice, as much as three times, as many as four times, as many as six times; I fix it from the many times I had to cross there and have seen them in there that many times; my plantation is right by it. On the inside of the right of way, I think, I had seen them that many times; I suppose I had; this is my best recollection, and the period I have in mind extends since 1901. I am including the whole time that I have been there in this estimate. I could not say how many times I had seen them in there prior to the time Miller was killed. I know that I have seen them in there since he was killed and I would think as many as three or four times—have seen them in there as many as three or four times since he was killed and as many as six times before and after he was killed, and probably three or four times before he was killed, running over a period of about 4 years. It is a fact that I and others who used that gate, as well as the railroad people, made an effort to keep the cattle off the right of way and generally succeeded, and generally they did not stay in there a great length of time; the purpose and object was to keep them out of the right of way. I knew the danger of them getting in there—of them being in—and the railroad did. I would not like to put a limit as to the number of times I have seen

the cattle in there; I have seen them in there before and after Miller's death.

136 During the Fall of the year I was there pretty often,—two or three times a week; during the planting season I would be in there about the same number of times; I think I would average two or three times a week. After I would get my crop out I would not be in there often; I would not be in there I should think to exceed two or three times a month.

There is a pretty fair dirt road extending from Sulphur Station down to those gates. Sulphur Station is about 2½ miles from the gates. From the main public road to the railroad is a little over ¾ of a mile.

There is a section gang that lives at Sulphur Station. They have a hand car and other usual equipment, and they have no velocipedes, that I know of, and a regular section house. At Sulphur Mines there is a telegraph station, the agent himself is the telegraph operator and telegrams are received and delivered at that station, and were on the date of the accident. I do not know anything as to word being given to the station to get cattle out; I am not familiar with this matter; but I have seen the section men driving them out at the gates, and have myself received warnings from the section foreman to keep the gates closed and keep the cattle out. I suppose the gates belong to the railroad company, as did the right of way fences. The maintenance of these gates facilitated the rice farmers and those who raised products, in carrying them to the depot.

I reside in Louisiana and came over here to attend this trial at the request of the railroad company and my transportation was furnished by the company.

On re-direct examination, the witness testified:

I have stated on cross examination that I knew I had seen cattle in the right of way enclosure at this point as many as 6 times, but I did not say that this is anywhere near the number of times

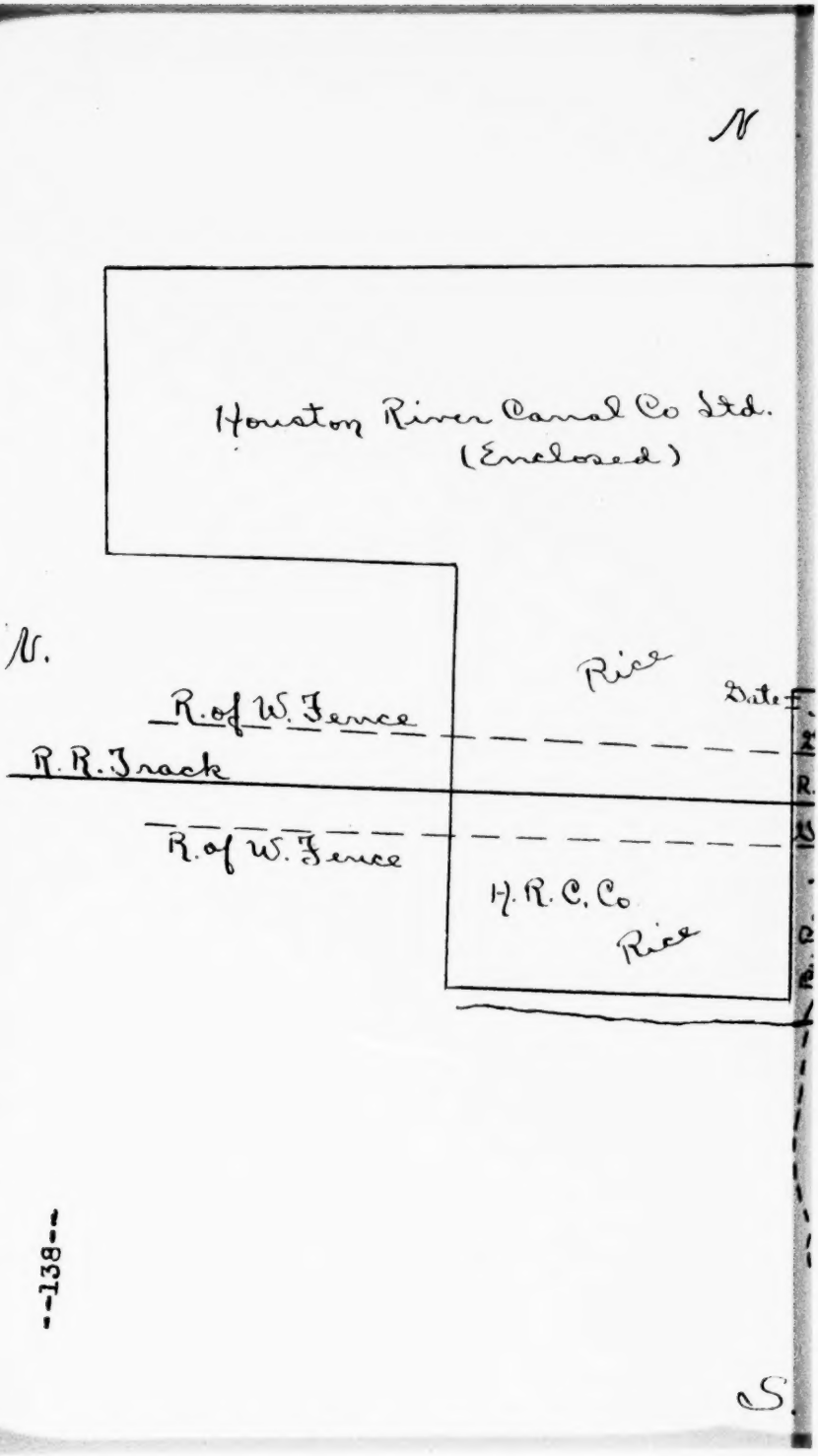
137 I have seen them; I think I have seen them more than that many times; I had seen them in there several times before this wreck.

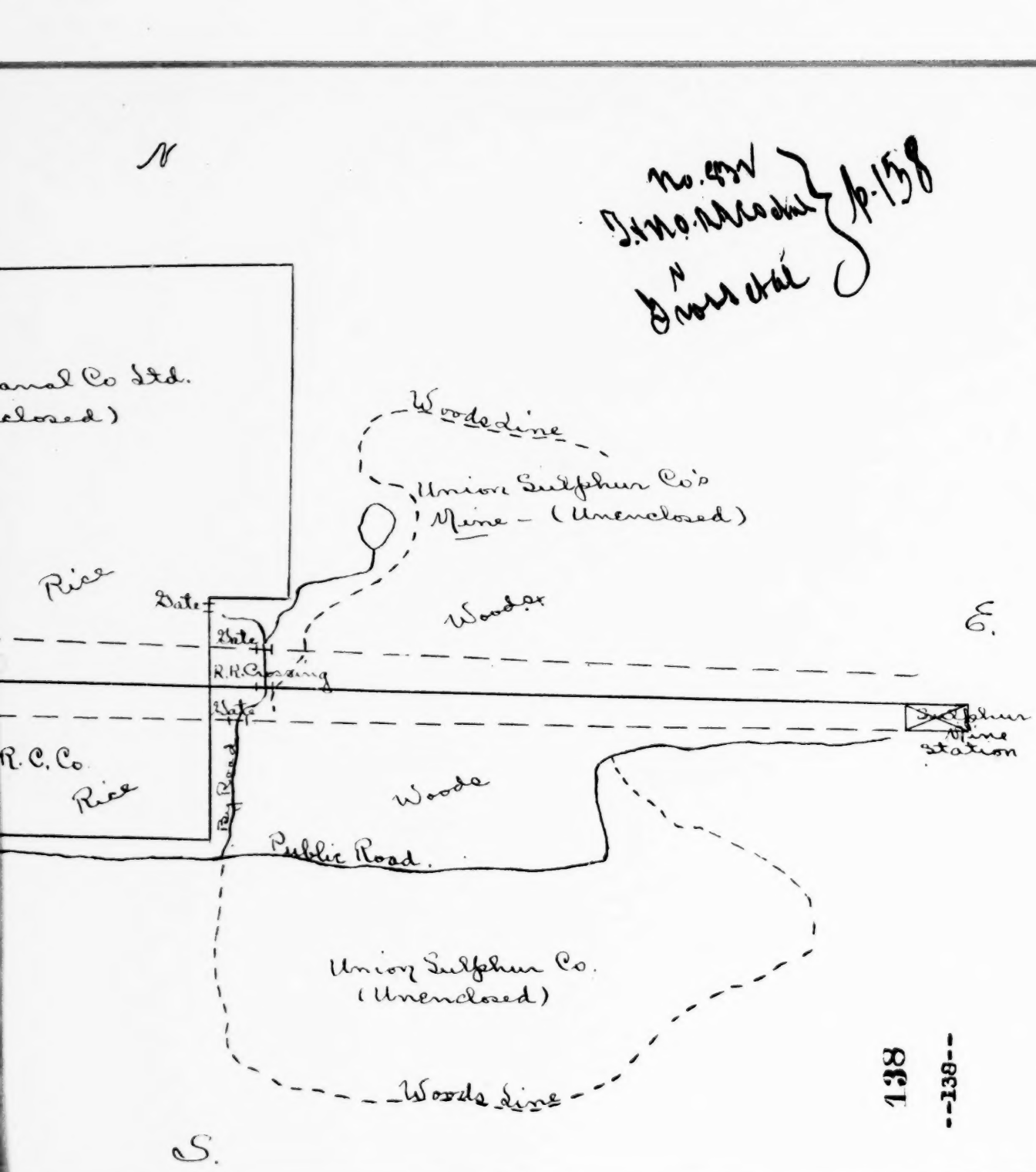
The woods and timber that I speak of is not on the enclosed right of way, but outside and beyond the fences, and when I spoke in my testimony above of seeing cattle in the timber and woods, I did not mean that they were then within the right of way enclosure, they were outside of it. When I have spoken of seeing section men getting cattle out of the right of way, I meant that I saw them driving them out of the gates. The railroad track at and in the vicinity of this wreck was straight. In my answer on cross examination, that engineers or other people passing along over the track could not see the cattle in the timber, I had no reference to their ability to see cattle on the right of way, engineers going on the track and looking out, could see cattle on the right of way ahead of them as well as anyone could; they would have just as good opportunity, under such circumstances, to see them as anyone. The timber referred to by me was on the outside and the right of way was enclosed by the right of way fences. At and prior to the time of this

wreck there was a muslin strip tacked up on each side of the gate posts, with a notice printed on it, requiring those using the gate to close it. So far as I know, the railroad authorities caused these notices to be posted up; I know they were on the gates. The notice now exhibited to me by counsel I recognize and identify as similar to those that I saw posted on these gate posts.

In this connection counsel for defendants offered in evidence and introduced the plat prepared and identified by the witness Sober in his testimony, and the notice as to closing gates mentioned in his testimony and identified by him, true copies of which, marked respectively, Exhibit A and Exhibit B are hereto attached as parts of this statement and are as follows:

(Here follows diagram marked p. 138.)


N
Houston River Canal Co Ltd.
(Enclosed)
N.
Rice
R. of W. Fence
R.R. Track
R. of W. Fence
H. R. C. Co
Rice
S.


N
No. 939
Dist. No. Alcohol
N
Woodsline
Union Sulphur Co's
Mine - (Unenclosed)
Rice
Date
Date
R.R. Crossing
Woods
E.
Date
Sulphur
Mine
station
R. C. Co
Rice
Woods
Pub. Road
Public Road.
Union Sulphur Co.
(Unenclosed)
Woods line
S.
138
--138--

139 EXHIBIT B.

*Notice.*

These gates and the crossing are for the exclusive use of the owners and occupants of the adjoining land. Such owners and occupants are hereby notified and warned to see that the gates are kept closed. The Railroad Company will not assume any responsibility for stock killed or other damage done by reason of these gates being left open.

MORGAN'S LOUISIANA & TEXAS RAILROAD AND STEAMSHIP CO.
LOUISIANA WESTERN RAILROAD CO.

By W. F. OWEN,
*Superintendent.*

140 C. C. MALLARD, a witness for defendants, being duly sworn, testified:

I reside at Globe, Arizona. In the year 1905 I resided at Lafayette, Louisiana, and was assistant superintendent of the Louisiana Western Railroad Company and the Morgan's Louisiana and Texas Railroad and Steamship Company, with headquarters at Lafayette.

I remember the derailment and wreck on the Louisiana Western near Sulphur Mines, on June 1st, 1905, and was there shortly after its occurrence, arriving on the ground somewhere between 6 and 7 o'clock in the morning of June 2nd. I went there to transfer the passengers and with help. I found the locomotive and tender down in the ditch, and the baggage car and mail car and negro coach and first white coach sort of zigzag across the track, some of the cars were partly down the bank. I observed the right of way fences in that vicinity and they were in good condition. I do not remember noticing anything in particular about the gates. This was what we called a farm crossing and those gates were put there for the sole use of the people on either side of the railroad, who had to cross there. I cannot tell how many such crossings and gates there were on the railroad between Lafayette and the state line of Texas on the Louisiana Western Railroad, but there were several of them which were constructed just as these were. I had been connected with these Louisiana companies for a little over two years at the time of this wreck and during that period from time to time at different points along this line cattle would get in when people would leave the gates open.

At the scene of the wreck I observed a cow, or bull, and it was badly mangled and it looked like it had been dragged and mashed. It was close to the wreckage, where the wreckage was. I noticed from the position of this carcass, blood was on the track, ex-
141 tending back westward about 50 feet from the crossing. The Superintendent and road master and the section foremen had charge and supervision over these gates and crossings, and that did not come within my official duties.

On cross examination the witness testified:

I am now superintendent of the Gila Valley Globe & Northern Railway Company. At the time Mr. Miller was killed, in 1905, I was assistant superintendent of the Louisiana Western Railway Company. This company always put in gates at the private crossings and maintained them. We had a section gang located at Sulphur Mine. It was a part of the duty of the section gang to keep cattle or other obstructions off the right of way, when they were notified of it or knew it. Of course if the section foreman would find cattle on the right of way, he would drive them out and close the gates. It could not have been the duty of the section foreman to notify the superintendent, it would have been his duty to drive them out, whether the section foremen were notified from time to time, would be a question for the dispatcher to answer, I could not recall a particular instance of their having been notified. If there had been a whole lot of cattle on the track and the officers notified of it, the trainmen would be notified. The point at which the section foreman stayed at Sulphur Mine was not over 100 or 150 feet west from the depot, where the agent stayed; they had no telephone connection between the two places at that time.

There was a day telegraph station at Sulphur Mine at this time, but I do not recall whether it was a night station or not, but I think it was. It would take a section crew with a hand car about 15 or 20 minutes to go from Sulphur Mine to the gates opposite which this wreck occurred. I do not remember how train No. 9 ran at that time,—that was three years ago; I think it was about like it is now, the time card will show. It must have been after dark
142 that it passed Sulphur Mine. This train leaves Lafayette about 5 o'clock. Edgerly is a station about 7 or 8 miles west of Sulphur Mines, I think a train would run from Sulphur Mine to Edgerly in about 12 to 15 minutes. Edgerly was a telegraph station in the day, but not at night and Vinton also was a day telegraph station, not a night station. Lafayette is something over a hundred miles from Echo. The telegraph station at Echo is both day and night. The day telegraph stations at Vinton and Edgerly are open from 7 in the morning till 7 in the evening.

If the section foreman at Sulphur Mine had notice that cattle were on the track and to go and clear it out, it would have been his duty to have gone immediately. There was an attempt always to keep the gates at private crossings closed; that was the purpose. Occasionally these gates would be left open just as your own gates would be left open. We kept no watchman at these gates, it would have been too expensive. If we had kept a competent watchman at all the gates, stock could not have gotten through those gates. Notwithstanding the fact that we knew the cattle went in there and the gates were sometimes left open, we relied principally on the farmers or other people who went through there to close them after they had gone through, and we relied on the section men keeping watch and keeping the right of way clear. That part of the duty was not in me at all.

It is considered and understood that under Rule 420 cattle might, if on the right of way, be an obstruction to the full speed of a train. It was part of the discipline and method of operating the Louisiana Western Railway for the foremen to turn out promptly with their men and remove any obstructions, whenever notified by the train men or others, even though the obstructions might be on other sections than their own, and I suppose that practice refers to and follows Rule 334, that it is the duty of every employé, regardless of
department, to report any obstructions of any kind to
143 the superintendent, and if possible to the nearest section or bridge foreman. At and prior to the time of this accident my headquarters were in Lafayette, Louisiana, and my jurisdiction extended from Algiers to Echo. Algiers is on the line of the Morgan's Louisiana and Texas Railroad and Steamship Company, and Echo is at the west end; there is a little gap in there, they call it the L. & W. extension. My jurisdiction extended westward just to the line between Texas and Louisiana. The movement of the trains operated under my supervision reached to Echo. I think the road-master's division of the Louisiana Western only extended to the bridge; Mr. Shackford was the superintendent of the Louisiana Western; he was under the immediate supervision of Mr. E. B. Cushing; the latter was General Superintendent and at that time under Mr. Fay, who was Vice President.

Mr. Fay at that time was Vice President of the Louisiana Western Railroad Company and the Morgan's Louisiana and Texas Railroad and Steamship Company; I could not say as to the Texas & New Orleans Railroad Company. He had head-quarters in Texas, at Houston, and he exercised supervision over that road over in Louisiana, as well as any road he may have exercised supervision over in Texas. Each of these railroad companies operated under its own charter, so far as I know; they each reported to Mr. Fay, as vice president, so far as I know he had absolute control. Mr. Fay sometimes came over the Louisiana Western Railroad in his special car; no charges were collected from him so far as I know. I did not have control of this part of it. It was a fact that he had a right to ride over that road in his special car and I never heard of him being charged anything or being interfered with for making such trips. He was recognized as the head of that system.

Engines running over that system sometimes took fuel from the part of the road that was within my jurisdiction, at Lake Charles, Lafayette and Algiers. I do not know what they did on the west side of the Sabine River. It is only about 27 miles from Lake
Charles to the Texas line, and Lake Charles was the last
144 point at which engines would take fuel in Louisiana when going westward. I am unable to tell anything about the charges that were made by the different companies for furnishing fuel to each other's engines; this is information that may be gotten from the auditor; I never kept any account of that sort.

I employed the conductors and the brakemen; I had control over them while performing services on the railroads within my jurisdic-

tion. I hired men that ran only to Echo. Lafayette was a terminal and the crews ran in and out of Lafayette. At the time of this wreck I think the division was cut at Echo—I know it was. There were no freight crews running through from Lafayette to Houston; they ran only to Echo and back to Lafayette. No freight crews would run from Lafayette to Houston, but the passenger crews would; the purpose of stopping them at Echo was that the run was too long; on the passenger runs the endurance was not so hard and the crews would go through because the passenger service was more rapid. A passenger employé was not likely to take the position that he would go from Lafayette to Echo and stop there and go no further; having undertaken to go on a run from Houston to Lafayette, he would realize that he would lose his job if he did not do so; these employés had an arrangement to that effect.

There is no repair shop for engines at Lafayette, but simply a round-house; ordinary repairs on engines are made there, and if any T. & N. O. engines needed such work as could be done at Lafayette, it would be done there, and if not, the engine would probably go for full repairs wherever the master mechanic and superintendent of motive power would say. There were two shops, one at Algiers, and one at Houston.

Mr. Fay, as vice president, exercised control over me and I followed his instructions. I do not know what company charges were made for the trestle work on the bridge over the Sabine
145 River; the superintendent of bridges and buildings of the Louisiana Western Railroad Company had charge of the bridge over the Sabine River and it was kept in repair by his forces; he took care of the whole bridge; but I do not know how the charges were made, but he did not have control of the yards at Echo, he had nothing to do with those yards, nor did I have. The part of the road from the middle of the bridge over the Sabine River to the station of Echo, in Texas, belonged to the supervision and charge of Mr. A. S. Johnson, who was superintendent of the Texas & New Orleans Railroad Company, whose road line extended from Houston westward to the middle of the Sabine River. Mr. Johnson, as superintendent of the Texas & New Orleans Railroad Company, had charge and took care of the track from the middle of Sabine River to Echo and thence to Houston, but the superintendent of the Louisiana Western Railroad Company took care of the bridge itself over the Sabine River. I simply had charge of the trains operated on the Louisiana Western Railway and ordering them in and out of Echo; I had nothing to do with the yards at Echo, but would simply send messages to Echo when to start the trains eastward; I merely had charge of the movement of trains, that is all.

I do not know and am not positive whether Mr. E. H. Harriman came over the Louisiana Western Railroad when I was located at Lafayette, or not. I think he did, but I do not recall what date.

E. E. SHACKFORD, a witness for defendants, being duly sworn, testified as follows:

My name is E. E. Shackford; my residence Lafayette, Louisiana; I am now, and since 1905 have been, superintendent of the Morgan's Louisiana & Texas Railroad & Steamship Company and the Louisiana Western Railroad Company and the Iberia & Vermillion Railroad Company, with headquarters at Lafayette, Louisiana. The Morgan's Louisiana and Texas Railroad and Steamship Company's railroad runs from New Orleans to Lafayette, and its branches.
146 and the Louisiana Western Railroad runs from Lafayette westward to the state line at Echo.

I have held this position since June 1st, 1905. I ran a train as conductor on the Louisiana Western Railroad as far back as 1888. The time card No. 18 shown me I recognize and identify as a time card of the Louisiana lines in effect April 24th, 1905, and which was still in effect June 1st, 1905, when I went with this railroad as superintendent, and it remained in effect some time after June 1st, 1905; and the time table succeeding this one came out in the month of August, 1905. This time table identified by me was in force and effect June 1st, 1905. This time table indicates a schedule of all the regular trains that ran on these railroads, including the trains running between Lafayette and Echo on the Louisiana Western Railroad, but it does not indicate any of the trains operated between Echo and Houston, Texas; there was another and separate time table for them. This time table shown to me was issued and purports to have been issued by Mr. Cushing, general superintendent of the Louisiana lines and Mr. Owen, Superintendent, and Mallard, assistant superintendent, and Mr. George, train master; these were officials of the Louisiana lines. I did not in June, 1905, nor have I since, held any official position or connection with the Texas & New Orleans Railroad Company, and have had no jurisdiction outside of Louisiana.

I identify the document now shown to me as train sheet covering the movement of all the trains operated over the Louisiana Western Railroad on June 1st, 1905, beginning at 12:01 A. M. and ending at midnight the same date. This covers all trains running on that date on that railroad, both schedule and extra, the report being made up in my office by the train dispatcher, and entered by him concurrently with the facts. This identical train sheet was made up under my direct supervision and I personally
147 know it to be a correct representation of the movements of the various trains, including their times of arrivals and departures at the several stations, as the same were contemporaneously reported by wire in my office at Lafayette. This train sheet served us both as a record and a guide for movements of these trains on that date. Extra trains are not put on the printed schedule heretofore mentioned in my testimony, but this train sheet has entered on it the extra trains, as well as the regular schedule trains, showing the hours of their arrival and departures at each station. This train sheet is kept and made up by the train dispatchers working in relays of three.

each one having a period of 8 working hours. This train sheet merely shows the arrivals, departures, and movements of trains on the Louisiana Western Railway and does not embrace the movements on the Texas & New Orleans Railroad after reaching Echo. There was never kept or promulgated at my office any train sheet or schedule for the movements of trains over the Texas & New Orleans Railroad between Houston and Echo; I had nothing to do with the business of the Texas & New Orleans Railroad Company; this was under the supervision of its own superintendent. These trains indicated on the time table and the printed schedule, as operated between Echo and Lafayette, were directed and controlled by the officials of the Louisiana Western Railroad Company and the officials of the Texas & New Orleans Railroad Company had nothing to do with them.

In the case of passenger crews coming from Houston toward Lafayette, I, as superintendent of the Louisiana Western Railroad Company, would first take cognizance when they would arrive at Echo, and I, as superintendent of the Louisiana Western, would then begin to take charge of them from there eastward; and crews coming from the direction of New Orleans, would remain under my control and direction, as superintendent of the Louisiana Western Railroad Company, until they reached Echo.

148 During the year 1905 and including June of that year, the auditor of the Louisiana lines issued all pay checks for all service of its employés, such as engineers, firemen, and conductors, for work and service done and performed by them on the railroads in Louisiana, including the section between Lafayette and Echo. I do not know of any written contract, in this connection, between the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, regulating the use of the respective tracks. I was generally familiar with the line of railroad of the Louisiana Western Railroad Company between Lafayette and Echo during the year 1905, before I went there, and immediately after I took charge of it at once became familiar with it. I am familiar with the vicinity of the wreck which occurred June 1st, 1905 near Sulphur Mine.

There were numerous private crossings on that railroad between Lafayette and the state line, as a general thing our stations in there are located 5 to 8 miles apart, and it was quite usual that you would find one or two of these private crossings between each of the two stations,—sometimes one and sometimes two; these private crossings were maintained there the same as everywhere else,—at the solicitation of some of the land owners who wished to cross over to get from their land on the one side to their land on the other. The facilities provided for this purpose consisted in an opening in the right of way fence and a gate placed there to be kept closed so as to have an enclosure when not in use. One of these gates was in the right of way fence on each side of the track. There was always more or less trouble then and now on other railroads, in regard to the gates being left open by persons passing through and cattle getting in through the gates and on the right of way, and we had our share of such trouble on the Louisiana Western. I formerly operated a train over that railroad. The right of way is generally fenced all through

that country, and has been so fenced for many years. I
149 am familiar with the track along about Sulphur Mine where the injury occurred, and was about the time of its occurrence. The track in that vicinity is a straight, open track for about six miles, including the point of this wreck and is almost a water grade level. The right of way along there is well cleared and in the day time, and it would seem also in night times, that the engineer and fireman operating an engine along that line, ought to have no difficulty from their positions in the cab to look ahead and see stock in the right of way near the track on either side.

I have looked over the train sheet indicating the number of trains passing between Lafayette and Echo on the date of this occurrence, and find that during the entire day there were 16 or 18 trains passing, according to my recollection, that is, counting the trains going both ways; this was from midnight to midnight, including the date of the occurrence.

On cross examination the witness testified:

The railroad through Louisiana was fenced when Mr. Miller lost his life, and these gates in the right of way fences at the private crossings were made for the use of land owners. One of the objects in building the fences was to exclude cattle. Cattle gathered on the track are a menace to trains in motion and an element of cost to the company if they are killed. When animals were seen on the inside of right of way fences by section men, it was their duty to put them out. If train employés in running their trains discovered one or two animals on the right of way, I don't suppose they would report it, but if they saw a bunch of cattle in there it was customary, but not a positive rule, that they should report it, but it was the custom, among the train and engine men, to report at the nearest telegraph office if there was a bunch of cattle upon the right of way at a certain location. A half dozen head of cattle would
come under that practice. There was no rule that they
150 had to do this; it was a kind of mutual affair that they would do this. We have a rule in the books that employés should report anything in the way of obstructions to trains, and that was regarded as one of the things that might possibly be regarded in the way of obstruction if cattle got on the track in the way of trains. An animal of the cow species on the track is an obstruction and one liable to cause an accident, and if inside of the right of way fence was liable to get on the track and become a menace to moving trains. I don't want to create the impression that this rule has any specific relation to stock on the track; that rule has reference to other kinds of obstructions on the track—a bridge burned, or something piled on the track that would not let a train pass. It means any obstructions; there is another rule following that defines what an obstruction is; it says, anything that impedes the safe passage of a train is an obstruction. Cattle inside of the right of way would not be necessarily an obstruction until they were on the track. I would not call it careful railroading to run trains over the road with the right of way full of cattle; to run over the road with cattle on the right of way in bunches of four or five head, in one sense

of the word, would not be careful railroading, but it is done every day and everywhere, not only on the right of way, but station grounds and public crossings where there cannot be fences. We have not a positive rule that says that whenever cattle are seen on the right of way by employés they are required to report that fact; I have looked into that and I cannot find any basis for it. The handling of cattle on the right of way, or running into them, is so far from the direct control of the engineers or other employés, that we do not charge their reports or charge their records with delinquencies for it, it cannot be done in active practice. I have given that question a good deal of thought. We don't charge the engineers
151 with things as regard the killing of cattle, but an engineer at all times when he is able to help out will send in a report; the engineer is required to report the circumstances, it hardly ever occurs that an engineer fails to report the striking of an animal; if he hits a head of stock he will report it and state that he struck it. I think that if it is found out that he did strike one and did not report it, it would be marked against him. The custom is one of discipline. If a man fails to make his reports he will be reprimanded or disciplined for it.

If on the afternoon of the night that Miller was killed, either section 1 or section 2 of train No. 5 killed a cow near Sulphur Mine, it was his duty to report that he killed a cow, but he would not make this report to the nearest station; he would make a written report after he got in to the end of his run, in writing.

Train first No. 5, going west, on June 1st, 1905, passed Sulphur Mine at 4:25 in the afternoon; train second No. 5 passed Sulphur Mine, going west, at 4:35 in the afternoon, those trains, respectively, passed Edgerly at 4:39 P. M. and 4:49 in the afternoon of June 1st. They passed Vinton, respectively, at 4:51 and 5:01 P. M., that afternoon. They arrived in Echo at 5:15 and 5:30 P. M., respectively, June 1st. At the time of their arrival at Echo I would judge that the sun was about an hour and a half or two hours high, it was still daylight.

Train No. 6 (a passenger train) passed Sulphur Mine, going east at 7:23 A. M., June 1st; train No. 10 (a passenger) passed Sulphur Mine going east, 10:45 A. M., June 1st; Train No. 60, local freight, passed Sulphur Mine at 6:50 P. M. Now this is the local freight that stopped their run at 6:50 and she was 22 minutes at Sulphur Mine. Sulphur Mine is east of where the wreck occurred. This local freight, No. 60, got to Sulphur Mine at 6:50 P. M. and left there at 7.12.

In June, 1905, only one of the officials of the Louisiana
152 Western Railroad Company resided in Texas; that was Mr. Fay, Vice President; he lived at Houston. My understanding is that he was also manager of the T. & N. O. Railroad Company in Texas. Our company, the Louisiana Western Railroad Company, had the same business with the T. & N. O. which we would have with the Kansas City Southern or any other connecting line. I know Mr. Fay was Vice President, but I can't answer positively what he was manager of; he was Vice President of the Louisiana Western and the

highest man in authority on the T. & N. O. as well as the Louisiana Western, I think. Dr. Knox, Chief Surgeon, lived at Houston; I know of no other employé of the Louisiana Western Railway Company living at Houston who would be termed an officer. Mr. Kellogg had something to do with the company, as Engineer of Maintenance of Way; he resided at Houston; his position is an important one, he having charge of the entire right of way. Mr. Fay sometimes came over our Louisiana lines; I do not know, from my position, whether he paid for the privilege or not. Whenever the Louisiana Western ran trains through Louisiana into Texas and needed any fuel, they took it off of the line of the Louisiana Western, took enough to last them until they got into Texas, and took water the same way; they also took lubricating oil and supplies generally in emergencies, but I suppose they usually took enough for the round trip; and vice versa, they took enough supplies in Texas and used it in getting into Louisiana.

I don't think we had a general baggage agent at the time; if it was Mr. Monroe, his resident was in Houston.

A folder being here shown to witness, showing the officers of various railroad lines composing what was called the Sunset Route, was shown to the witness and by reference to it he said:

That correctly states the officers and where they live and the agents and where they live.

(And this folder was here introduced in evidence by plain-
153 tiffs' counsel in connection with the testimony of this witness.)

*Folder.*

Said folder showed that E. H. Harriman was president of the Louisiana Western Railroad Company, and also president of the Texas & New Orleans Railroad Company; that W. W. Monroe was general baggage agent of the Louisiana Western Railroad Company, and resided at Houston, Texas; that A. V. Kellogg was engineer of maintenance of way of the Louisiana Western Railroad Company and resided at Houston, Texas, and that Percy Hewett was superintendent of telegraph of the Louisiana Western Railroad Company, and also resided at Houston, Texas; that W. H. Taylor was general agent at Houston, Texas, of the "Sunset Route" (which term "Sunset Route" was explained by a former witness;) that J. F. Sullivan was city passenger and ticket agent at Houston, Texas, for said "Sunset Route"; that Harry Redan at Houston, Texas, was travelling passenger agent for said "Sunset Route" and that Charles Hong at Houston, Texas, was Chinese and Japanese passenger agent for said "Sunset Route," and said folder contained the time-tables of the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, the Galveston, Harrisburg & San Antonio Railroad Company, and the Morgan's Louisiana & Texas Railroad Company. Said folder was stated by said witness to state correctly the names of said officials at the time of the wreck in question.

The different lines of railroad in Louisiana and Texas extending from New Orleans to El Paso, are all parts of what is known as the

Sunset Route. It appears on this folder that W. H. Taylor was General Agent. I am not familiar with his position. I am casually acquainted with Mr. Sullivan, the Sunset Route Agent. I think Mr. Monroe was also General Baggage Agent of the T. & N. O.

Our trains in Louisiana are handled from Lafayette from the train dispatcher's office, between Echo on the West and New Orleans
154 on the east. I cannot answer as to what engines we used in running from Lafayette to Houston without referring to the records. I think there were engines of the Louisiana Western and also the G. H. & S. A. I could not answer specifically their initials—what initials were on those engines, but they were run through and are now, with the same crews on passenger runs. The passenger crews would leave Houston, for instance, and would go through to Lafayette with the trains; they would have no option on a given trip of stopping at the state line or at the end of the road; the trains were scheduled through and these crews manned them through. The inquiry whether an employé who started on a passenger run from Houston to Lafayette would be allowed to stop off at Echo on a given trip, and thereafter kept in employment or let out, is a funny question; such a thing as that could not happen: it is like a man starting on his run and changing his mind and saying he would not go; they don't do that.

Our ticket agents on the Louisiana Western would, of course, sell through tickets from points on that line to any point in Texas; These railroads advertise a through service; this matter of advertisement is not in my department.

Mr. Fay, I believe, is and was, in 1905, Vice President; the highest representative of the Louisiana Western Railway Company, and all other officers were subordinate to him; I believe he holds the same position with reference to the T. & N. O. Railroad Company and did at the time of the accident.

On redirect examination the witness testified:

The ticket agent on the Louisiana Western Railway would not only sell a ticket from any station on that line to any station on the T. & N. O. or G. H. & S. A. in Texas, but would sell a ticket to a destination on any other line in the United States with which
155 there was a connecting route, and would necessarily do so. This is a universal custom among railroads, and they all sell coupon tickets on lines all over the United States to any given point, without having any close relation whatsoever.

The expression "Sunset Route" is merely a term used for the purpose of advertising, as I understand, a given route, just as the expression "Southern Route," or the "Piedmont Air Line," and other similar expressions.

In case of an engineer striking stock on a railroad track, it is neither the custom nor his duty to wire any report as soon as the accident has occurred; but he is required to make a written report on a blank form for that purpose which is turned in by him at the end of the trip to the master mechanic. The three forms shown to me by defendants' counsel, filled out and signed by William Miller and C. Gross, are examples of the form used (witness here referring

to the stock killing reports submitted to him by counsel for defendants.)

I would not state positively that T. Fay is or has been Vice President of the Texas & New Orleans Railroad Company, but he was and is Vice President of the Louisiana lines.

On further cross-examination the witness stated:

It is true that E. H. Harriman is President of the Railroad Company owning and operating the lines in Louisiana and of the Texas & New Orleans Railroad Company.

I have nothing to do with getting up the folders presented to me and know nothing more of them than counsel.

Ordinary repairs on the engines used would be made at Houston; emergency repairs, at Lafayette, such as could be done, but it would be usual to have repairs done at Houston where the general shops were. We do as much repairs on cars in Louisiana as anywhere else.

156 I cannot state specifically that such repair work would be done at Houston any more than in Louisiana. The cost of maintaining the engines in the service of both lines would be prorated on the miles they made upon each line; if they made a hundred miles for Louisiana Western and a hundred for Texas, the cost of that maintenance would be paid half and half; if it was a different proportion it would be so prorated. The work they do for each fellow that fellow pays for it, and it is divided by the mileage they make. The same rule applies in the repair of cars, except that the company owning them would pay for repairs of same when it is specifically known that the impairment occurred on its line; if we know a defect occurred in Louisiana, the Louisiana company would have to pay for repair of that car.

I do not mean to say that the general shops for the Louisiana Western Railway Company are located in Houston. The general shops of the Louisiana lines are located in Algiers, La. These shops at Algiers belong to the Louisiana Western Railway Company and the Morgan's Louisiana & Texas Railroad and Steamship Company; but the through engines drawing passenger trains between Lafayette, La., and Houston, Texas, receive their repair work principally in the shops located at Houston. The engine that Mr. Miller was on at the time of the wreck was very badly damaged. It was brought to the Houston shops for repairs. I do not know whether that engine belonged to the Texas & New Orleans Railroad Company or the Louisiana Western Railroad Company, without looking at the records.

In connection with the testimony of the witness Shackford the defendants offered and introduced in evidence the printed schedule and the train sheet mentioned and identified by the witness in his testimony, which are as follows, in substance and effect, respectively, to-wit:

157 The printed time table is No. 18 and purports to have taken effect April 24th, 1905, and to have been promulgated and issued by E. B. Cushing, General Superintendent, William F. Owen, Superintendent, C. C. Mallard, Assistant Superintendent, and A. F. Church, train master for the Morgan's Louisiana and Texas

Railroad and Steamship Company and the Louisiana Western Railroad Company; the printed schedule for the Louisiana Western Railroad Company covering the operation of trains between Lafayette and Echo, showing the stations in their order and the mileage between them, aggregating the total mileage between Lafayette and Echo of 106.60 miles. This printed schedule shows, also, that there were 12 regular trains operated daily from Lafayette to Echo, and a like number operated daily from Echo to Lafayette during the period covering the date of this accident, the extra trains not being designated on this time table.

The train sheet here introduced in evidence consisted of a tabulated statement in the original handwriting of the train dispatchers on duty, covering the train operations and movements on the railroad extending between Lafayette and Echo, during the twenty-four hours of June 1st, 1905, beginning with 12:01 A. M. of that date and closing with 12:01 A. M. June 2nd, 1905. This train sheet contains a printed list, beginning with Lafayette and showing in their order the several stations between that point and Echo, and showing the distances between these respective stations, as follows:

Lafayette, 5:14 miles to Scott; 10:36 miles to Rayne; 6:53 miles to Crowley; 6 miles to Easterwood; 2 miles to Midland; 5.49 to Mermenteau; 4:94 miles to Jennings; 5:63 miles to Roanoke; 5:08 to Welsh; 10:47 to Iowa; 11:55 to Lake Charles; 2:32 miles to West Lake; 7.73 miles to Sulphur Mine; 7:73 miles to Edgerly; 5:41 miles to Vinton; 5 miles to Tumey; 4.76 miles to Echo.

158 This train sheet shows that during the 24 hours of June 1st, 1905, there were operated over the line of road extending between Echo and Lafayette and passing the point of the wreck, 12 regular and extra trains going west, and 14 regular and extra trains, including the wrecked train, going east.

This train sheet further shows by its tabulated entries, the following train movements:

That First Section of No. 5 (a passenger train, drawn by Engine 257, Dobbins engineer, a west-bound) left Lafayette at 1:18 P. M., June 1st, 1905, passing Sulphur Mine Station at 4:25 P. M., passing Edgerly at 4:39 P. M., and reaching Echo at 5:15 P. M. June 1st, 1905.

That Second Section of No. 5 (passenger train, drawn by Engine 251, with Wilson as engineer—on which the witness Reese was fireman—going west) left Lafayette at 1:28 P. M., June 1st, passing Sulphur Mine at 4:39 P. M., passing Edgerly at 4:49 P. M., and reached Echo at 5:20 P. M., June 1st, 1905.

That Train No. 245, drawn by Engine 194, with Hildebrand engineer, a freight train, going west, left Lafayette at 1:45 P. M., June 1st, passing Sulphur Mine at 8:15 P. M., passing Vinton at 8:55 P. M., and reached Echo at 9:30 P. M.

That extra freight train drawn by engine 213, with the witness Kimmer engineer, going west, left Lake Charles at 10:30 P. M., June 1st, 1905, passing Sulphur Mine at 11:07 P. M., reaching Vinton at 11:53 P. M., leaving Vinton at 11:56 P. M., and reaching Echo at 12:15 A. M., June 2nd, 1905.

That Local Freight Train No. 60, drawn by engine 173, going east, left Edgerly at 4:29 P. M., June 1st, 1905, reached Sulphur Mine 6:50 P. M., left Sulphur Mine at 7:12 P. M., and reached Lake Charles at 8:35 P. M.

That Passenger Train No. 8, drawn by Engine 250, with engineer Miller (deceased) in charge, going east, left Echo at 11.02 P. M., June 1st, 1905, left Vinton at 11:23 P. M., met and passed
159 west-bound extra freight drawn by engineer Kimmer, at Edgerly (time not noted on train sheet, but according to testimony of Engineer Kimmer, about 11:35 P. M.) and No. 8 then disappears from the train sheet before reaching Sulphur Mine, with the following memorandum noted on train sheet: "Wrecked 1¼ miles west of Brimstone." Brimstone is shown (on the map of the L. W. railroad, attached to the Printed time card introduced) to be situated between Edgerly and Sulphur Mine, close to the latter place, but the place referred to as Brimstone in this memorandum is not indicated in the list of regular stations on the time card or train sheet.

HARVEY HILDEBRAND, a witness for defendants, being duly sworn, testified:

My name is Harvey Hildebrand; I am an engineer on the Southern Pacific. During the year 1905 I was on the Louisiana Western in Louisiana.

I remember the derailment of a locomotive drawing a passenger train on which Miller and Gross were killed, somewhere near Sulphur Mine. On the date of that occurrence, June 1st, 1905, I made a trip between Lafayette and Echo, as engineer on a freight train. I came from Lafayette to Echo on that date; I passed the scene of the wreck—where it afterwards occurred—about 8:30 P. M., it was dark when I passed there; I know where the derailment occurred; I judge this place was about 2½ miles west of Sulphur Mine. In passing the point where the wreck afterwards occurred I did not encounter any stock nor observe any, so far as I remember. I heard of the wreck that night and after I had passed that point, if I had struck any stock there I would have known it. I did not strike any, nor observe any that I remember. The train that my engine was drawing was a freight train that ended its run at Echo. It was operated over what was called the Louisiana Western Railroad. The Superintendent of the road over
160 which I operated and to whom I reported was Mr. Shackford. Mr. Owen had been the superintendent, but I think at that time Mr. Shackford had taken his position. I got to Echo on this trip at 9:30 P. M. I did not meet or pass the train that engineer Miller was operating; I arrived at Echo before he did. At that time I had been operating engines between Lafayette and Echo about two years. During that time on that portion of the road I had observed cattle inside of the right of way while operating the engine. I couldn't state how many cattle during that period I had seen inside of the right of way fences, but I often saw them, say, every trip or two trips, or something like that; I would see them

inside the right of way fences along at different points between Lafayette and Echo.

On cross examination the witness testified:

I remember the crossing gates near the point where the wreck occurred; I remember them. When I went by there that night I don't remember whether they were open or not, and I could not have seen them, it was after night. I don't remember that the gates were broken down about that time. I was pulling a freight train and ordinarily was looking on my track; I did not take much time looking on the sides. I do not know what other engineers expect as to the track being kept clear of cattle or other obstructions; I cannot say that as a general rule the track was kept clear of cattle, because I have frequently seen them. The fence was put there to avoid killing stock, I suppose; I suppose the fences were put there to keep cattle off the track, I don't know, I suppose that is what they were put there for. There were parts of the track that were not fenced in the city limits, in the town and city limits, I mean, for instance, places like Edgerly and Vinton, around the depots there was no fence; I know plenty of stations where no agent or employé is kept and where they are all closed at night; there are stat-
161 tions along that line where there are no employés. I don't know that it was the duty of the section men to keep cattle out of the right of way. On the railroad between Echo and Lafayette I would probably make three trips and see stock on the track every trip, and may be would then make two or three trips and wouldn't see any; I do not mean to say that I always saw stock on the track at the place where this wreck occurred; I can't remember ever seeing any right at this exact place, but I had seen them along there between Sulphur Mine and Edgerley, and I have seen them around where the gate is, inside the right of way fences; I do not mean to say that I saw cattle there at the place where this accident occurred every time I passed there, but have seen them there at times during the two years that I ran by there; I had seen them on the track about where the wreck occurred before Miller was killed, within the two years that I had been running there; I was operating over that railroad as engineer when he was killed.

W. H. KIMMER, a witness for defendants, being duly sworn, testified:

My name is W. H. Kimmer; I am a locomotive engineer and remember the wreck of a passenger train on the Louisiana Western Railroad near Sulphur Mine, in Louisiana, June 1st, 1905, in which engineer Miller and C. Gross were killed. I was a locomotive engineer operating a through engine on that road at that time. On that date I left Lake Charles going westward to Echo. We got to Echo about 12 o'clock that night June 1st, 1905; we passed the station of Sulphur Mine 4 times on that date, that is, making two round trips, passing Sulphur Mine on that day. On the first trip I passed Sulphur Mine and went to Echo and then left Echo and went back to Lake Charles and then I left Lake Charles at night, going back to
162 Echo, and passed Sulphur Mine at 11:07 P. M. Sulphur Mine is about 2 miles or a little over east of where the wreck oc-

curred. I reached Sulphur Mine at 11:07 P. M., and continued on west towards Echo. It was west of Sulphur Mine where the derailment occurred and the next station was Edgerly and in going from Sulphur Mine to Edgerly we passed over the point at which the wreck afterwards occurred. We met the passenger train that was being drawn eastward by Miller and Gross at Edgerly; we reached Edgerly and passed the east bound passenger train there about 11:35 P. M. When we passed the point between Sulphur Mine and Edgerly, at which the wreck afterwards occurred, and which place I am familiar with, my engine did not encounter any obstructions on the track nor did I observe any stock there at that place or about there. When I arrived at Vinton after having met the passenger train at Edgerly, we were asked by the operator at Vinton, which was a night office then, if we delayed or stopped No. 8 at Edgerly, as she had not shown up at Sulphur Mine, which was another night office, and we told the operator that we did not, and on our arrival at Echo we heard of the wreck having occurred between Edgerly and Sulphur Mine, so that No. 8, the passenger train on which Miller and Gross were engineer and fireman, thus had not reached Sulphur Mine and this was the cause of the inquiry made of us by the operator at Vinton.

On cross examination the witness testified:

I say that I did not observe any cattle within the right of way when I passed the point of the wreck; as a rule I looked ahead of my engine when I was running, but I sometimes have duties to perform that draw my attention to the inside of the cab; I don't remember of my attention being specially called to the inside of the cab when I was passing this point; I have no distinct recollection
163 when I passed this point of looking out ahead; I do not remember that my attention was occupied with something inside of the cab when I passed the point, though it is possible that I was so occupied. I do not think that it is possible that there were cattle there on or near the right of way that I did not see and that I could not have seen them. We will say the attention of the engineer was called inside of the cab, but his sight is advanced far enough to see ahead that there is nothing on the track when you look inside. You can see pretty far ahead on a straight track. I presume that I was moving about 30 miles an hour; that portion of the road was fenced and the object of the fence was to keep cattle off the track. I was not expecting to find cattle on the track at that point and was not especially looking out for cattle, and I don't think that I had my attention drawn to anything in the cab, though it might have been possible. I don't think that I could have passed any cattle on the right of way at this point and not seen them; it might be that they were on the opposite side from me, but they had got to be mighty far distant from me if there were any there without my seeing them, for you can see pretty far ahead; it was my duty to be looking ahead; the engineer is supposed to be looking ahead; there were woods along there; if the cattle had been lying down or been in the woods I don't know about seeing them; the only thing I can say is I did not see any.

I passed Sulphur Mine at 11:07 P. M. I guess it took me about 4 minutes to go from Sulphur Mine to Vinton, that would make it about 11:10 P. M. when I passed the point of the wreck and the accident happened about 11:45, about 34 minutes after I passed there. I do not know anything about the cattle business; I did not notice whether the gates were open; I did not see any dead animal at or near the place where this wreck occurred as I passed, and I do not know whether there was one there or not; I did not see any cattle. If there was one lying there it just was not up where I could see it and that is the reason I didn't see it. I did not see any
164 cattle there, that is all that I can say. I never made a study of the habits of cattle and do not know anything about their characteristics when one of them is crippled or killed. I was raised partly in the country.

When cattle would get in the right of way the section boss puts them out; it is his business to do it. I guess it is a train employé's duty to report cattle on the right of way to the superintendent at the next telegraph station and to the station agent, if he is an operator. If after seeing cattle in the right of way, I saw a section foreman, I would throw off a note to him, that is, to the nearest section foreman and it would then be his duty to drive the cattle out of the right of way.

G. E. BUSTIN, a witness for defendants, being duly sworn, testified:

My name is G. E. Bustin; I live in Houston Heights, Harris County, Texas, but am working on the Frisco.

On June 1st, 1905, I was with the Southern Pacific Company, located at Sulphur Mine, in the state of Louisiana. I was section foreman for the Louisiana Western Railroad Company; my section took in one mile of the track east of Sulphur Mine station and 5 miles west of it. I remember the derailment of a passenger train *train* on the night of June 1st, 1905, in which the engineer and fireman, Mr. Miller and Mr. Gross, were killed. I know the location of this derailment and it was within my section. At the time of this wreck I had charge of this section for probably 6 or 8 months and was familiar with the condition of the track and road bed at and prior to the time of the accident. The track was in splendid shape; in this vicinity it was a straight line and practically level; the right of way at this point and its vicinity was fenced; there was a private crossing right at the place where this happened and there was a gate in the right of way fence on each side of the railroad track. Those gates were equipped with fastenings for the purpose of se-
165 curing them when closed; the fastenings generally consisted of an upright post and a piece of timber nailed on the side, with a slide fastening that entered into a sort of a slot; when the gate was pushed together and this slide was pushed into the slot, it would make the fastening secure. These gates were used for the private crossings. It was a private crossing, I do not know whom it was built for, but almost anybody passing through there in crossing would use those gates. This crossing and these gates were not

used by the railroad men. These gates were very often left open by people passing through them. I had trouble with stock getting in there. Every once in a while I would find some stock when I would pass there; they would be in there and I would always shut the gate, I noticed that very particularly; I always drove the stock out when I found them in there and I was always particular about that.

I was along there on June 1st, 1905. On this occasion I found the gates open during that day some time; I don't remember what time of day, but I shut the gate that day. There was only one of the gates that I found open. At that time I found no cattle in there whatsoever. I can't remember what time of day it was that I found this gate open and shut it; I know I shut and closed the gate that day; my report shows I did and I know I did it that day, but I don't remember the hour and I don't remember whether it was in the morning or evening that I shut it, but my report showed that I shut it on that day. I went home from work that evening somewhere about 6 o'clock; I got into Sulphur Mine probably a few minutes later than 6; I had my section crew with me. There was a printed notice posted on these gates asking people to close them. The notice here shown me is just exactly like the one that was posted at these gates.

163 (The witness here identifies the notice that was referred to and identified and introduced in connection with the testimony of the witness J. A. Sober, a copy of which appears on a former page of this statement.)

Continuing, the witness testified:

This notice was fastened on the gate on the outside of the gate. I knew of this wreck I suppose in an hour after it happened; the conductor came down to my house and woke me up and I went down with my push car to haul the injured men to my house; we could not get any train right there at the time. I observed the wreck and it was a pretty bad one, the track was pretty badly torn up. We spent a good deal of the remainder of the night getting the injured men to the house and waiting on them. I was not there at day light; it was in the day before we got there to the wreck; I was up all night and I was waiting on the engineer, Mr. Miller; he was taken to my house; my section house was at Sulphur Mine, Louisiana.

I assisted in the repair of that track after the derailment and after the wreck was cleared; my men and I worked on the track under the supervision of Mr. Lawlor, who was road-master of the railroad company there. I cannot remember the exact number of ties that we used, but I guess somewhere about a couple of hundred that were broken that we had to replace; I did keep account of them, but I do not remember now the exact number. Those which were broken up we could not use again and took them out. I suppose we were a couple of days and probably three days engaged on this repair work before we finished. The ties which were broken up and which were discarded were sound; they were all sound ties; it is not true that

they were rotten; they were sound, but many of them were broken and torn and split to pieces. We found some of the ties with dents in them from the point back where the derailment first
167 started, and we left some of these in there with the dents on them; they were perfectly sound and were just marked with the dents. Those that we took out were sound, but they were broken all to pieces so that — could not be used any more, and none of them were taken out on account of being rotten.

On cross-examination the witness testified:

The ties that were broken and torn were just broken all to pieces so that they could not be used any more, and one tie would be so splintered that maybe it would be in 150 pieces; there were, I suppose, nearly a couple hundred of them were broken badly. There were a good many of them broken into very many pieces. I suppose that the track on which ties were broken up covered, I suppose, about 200 feet, though I cannot remember exactly the distance; I don't think there were hardly any ties at all in this space that were not broken; I am satisfied there were not; they were all just brushed and broken to pieces.

There was only one head of cattle that had been killed that night. It was a big bull, I think, and was red; I never saw this animal before that derailment; that was the first time he had ever been on that right of way, so far as I know. I did not see any other cattle in there that night or the next morning; I did not get any cattle out of there on that day after the wreck; I looked to see if there were any cattle within the right of way the next morning after the wreck and did not find any, and this one that was killed was the only one on the inside at that time. I did see another dead animal in there the next morning; there was a dead yearling that was killed the second day before this occurrence, right at the same place; it came through this gate. The people had a practice of leaving gates open in going through there and I had to shut it every day. This other animal that was killed was a yearling and had been there from the second day before this wreck happened; it was right
168 even with the gates; right at the crossing, I think it was; I suppose about 50 yards west of the crossing where this yearling was killed. This yearling was lying on the south side of the track down in the dump on the west side from the crossing about 50 ft. west of the crossing on the south side of the track; that was not the side that the bull was on; the bull was on the east side of the crossing and it was on the north side of the track when I got there; it had been dragged out from under the trucks. The bull and the yearling were on opposite sides of the crossing; I guess they were about 100 yards apart. I had never seen either of these animals in there before, that I know of; I cannot say that I had seen these same ones.

I suppose the engine ran about 30 feet on the ties before it began to bunch them up; probably about 20 feet, I guess; it began to bunch them up; it appeared to run about 20 feet, I would think. I can't tell exactly, before it began to bunch the ties. The engine was

derailed and the baggage car and the two front coaches were derailed. I can't swear to whether the marks I saw on the ties were made by the engine or the cars; but what I do say is that about 20 feet from where the ties were bunched there were wheel marks on the ties that remained in the track; and whether these dents were made by the wheels of the tender or the coaches I could not swear, but I suppose that the marks I saw on the ties were made by both the wheels of the engine and the cars; I don't know, hardly, how they could have been made by the car wheels alone, though they may have been so made. The engine was down in the dump about 10 feet from the track. The rails and track were torn all to pieces; the rails were broken up and all thrown around and bent up and out of alignment, and the entire track was torn up. The bull was lying right up against the track when I saw it; I suppose it had been pulled out a little way. The track was torn up at that place. I don't remember exactly, but I suppose it was about 50 feet, prob-
169 ably a little over, from where this animal lay back to where the track was all torn up.

During the day of this accident I worked about 2½ miles or 3 miles west of where the accident occurred; I worked out there all day; I started out at 7 o'clock, that is, I left my tool house, about 7 o'clock in the morning; I started from Sulphur Station when I went out in the morning. I quit work and started in to Sulphur Mine, I suppose, about 15 or 20 minutes of 6 in the evening and at that time was to the west of the place where this accident happened, about 2½ or 3 miles. We ran in on the hand car about 10 miles an hour, I guess, and passed by where this wreck occurred that same afternoon. I guess we passed that point coming in somewhere about 10 minutes after, or might have been very near 6. I don't remember exactly what time I got in that evening; some evenings I would be a little late coming in, but we passed that point close to six o'clock. I saw that the gates were shut that evening. I closed the gates that day, but I do not remember what time I closed them; my reports show it, and I know I did do it. I only passed that point twice that day and I must have closed the gate going out to work or coming back that evening; I could have done it coming back; I could have found them open coming back and closed them then, and if they were open when I came back, that is when I closed them. It was my duty to close them if I found them open. I saw no cattle on the track or on the right of way as I went in that evening; did not see any at all; I did not see this bull, but I saw the dead animal lying by the track at that time. If I had observed cattle in there on the right of way as I came in that evening, it would have been my duty to get them out and close the gates. If I had received notice from any member of the train crew passing by me that cattle were in the right of way, it would have been my duty in that case to have gone and drove them out and closed the gate; that is what I would have done and that is the practice.

170 On redirect examination the witness testified:

The dead yearling that I spoke of seeing I first saw lying dead at that point the second day before the accident happened. It had been killed the day before the accident. When I saw it it was lying, I suppose about 20 feet from the railroad track on the south side of the track and on the west side of the crossing. It was our practice, if an animal has been killed at a point off where it doesn't bother anybody, occasionally to let them lie in such position and decompose, though we generally buried them if they were anywhere near to be offensive to anybody. There was hardly any passing there and it was not a public crossing at all; it was not used very often, nearly every day somebody would pass there, but just working men.

Right at that place sometimes every few days maybe one or more cattle would get in through the gates that would be left open. The animal that was killed in there a day or two before that wreck was far enough from the railroad track so as to be off the track; it was about 20 or 25 feet probably from the track and no obstruction to trains whatever.

L. LAWLOR, a witness for defendants, being duly sworn, testified:

My name is L. Lawlor; my residence Lake Charles, La.; I am road master of the Louisiana Western Railroad Company, and occupied this position in June, 1905, and prior to that time. My division as roadmaster embraced the railroad between Lafayette, Louisiana, and Echo. I came on that division in March, 1905. My duties as roadmaster were to look after the repairs of the track, keep up the track and fence, and everything else connected with the railroad. I had

171 under me to do that work 17 section gangs in all, located at various points and with various sections of line between the termini of my division. I also had one small extra gang.

I remember the occurrence of the wreck and derailment of a passenger train near Sulphur Mine on the 1st of June, 1905, in which Miller and Gross, the engineer and fireman, were killed, and I know and am familiar with the point at which this wreck occurred, and know of the condition of the road and track there and in that vicinity at the time of the derailment and prior thereto. The condition of the road bed and track at and in the vicinity of that point, at the time of the wreck and prior thereto, was first-class. On the day of the derailment and previous thereto, I was upon train No. 60, a local freight, sprinkling the track with fuel oil, between Echo and Lake Charles, and passed over the point at which the derailment afterwards occurred. I passed along over this point about half past five, P. M. The wreck afterwards occurred at that point about midnight. I was there after the wreck occurred. I went there to clear the wreck up that night after its occurrence. When I passed along there on the local train about half past five that evening before the derailment, I observed no stock within the right of way fences at or in that vicinity; I would have been very apt to have noticed any stock if they had been there at that time, because I was standing on top of an oil car attending to the valves and was sprinkling the track with oil to kill the grass on the track.

From that point the train that I was on went on to Lake Charles. When I heard of the wreck I was in the Southern Pacific lunch house right opposite the passenger depot in Lake Charles; Lake Charles must be about 12 miles from the point of the derailment. Somebody came to me and woke me up and told me there was a derailment over there. I got up and put on my clothes, came down to the passenger depot and phoned and found where the wreck had occurred, and about that time there was a relief train came and I went with the relief train to the point of this wreck and got there about 1 or 2 o'clock that night after the occurrence; the relief train met
172 a push car and it had the engineer and fireman on it, taking them to Sulphur Mine; they had a flag and flagged us and we got those two men on the coaches we took with us; I helped put them there, the engineer and fireman both; and we took them to Sulphur Mine and brought them to the section house. Afterwards we went right straight to the wreck; they backed down to the train and I got off and walked down to where the wreck was, to clear the track and get it open. I wired for the section foreman, all the force I could muster to get to the wreck to clear it up, and we had the track open some time about 6 o'clock in the morning, partly open, as much as we could. We found where the engine got off of the track first close to a private crossing, and that she ran about 195 feet before she got off the ends of the ties. I could determine this from the track of the wheels on the ties; I saw the impressions on the ties for that distance from where the track was torn up. There are a good many of those ties in the track to show the impression of the wheels on them. The engine ran about that distance and then I suppose it must have been the fire box or something got down and when she got off the ties, cut the end of those ties; from the appearance of the ties the bottom of the fire box caught the end of the ties and bunched them up and dragged them in bunches here and there and throwed the engine and cars all off. About 180 feet of the track was thus torn up. These ties that were thus torn up were in splinters, they seemed to be pretty sound timber; these ties were not rotten; I did not see a rotten tie in the bunch anywhere; they were all cypress timber. As soon as we got the cars off we started in to replace the rails and we had to use a rail of a lighter section until we got the 75 pound rail on the ground. We used the same kind of ties; used some of those that had formerly been in the track and used about 90 new ties. We put these new ties in place to repair the track in the former position where they had been all torn up. In my division of
173 this railroad, from Lafayette west, there were a great many of those private crossings, and gates just like this one. My experience with those crossings with gates was this, that it was impossible to keep the gates shut on them; the people along there leave them open, although we gave notice to keep them shut. I had notices such as this one (referring to that introduced in evidence in connection with the testimony of the witness Sober) sent out and they had been put up long before this derailment occurred; I caused one to be posted at this crossing; we had these gates at this point equipped with what are called standard fastenings; these gates were kept and maintained

in good repair for the purpose of the people living in that vicinity, for the accommodation, principally of those people growing and hauling rice in there, and especially the Houston Rice and Irrigation Company, who had lands on both sides of the track, and it was at the request of this company, for which Mr. Sober was the agent and manager, that this private crossing and the gates at this point were put in. The company for its own purposes had no use whatsoever for this crossing or these gates.

My employment and work, as road-master, was for the Louisiana Western Railroad Company; that company paid me for my services, and the T. & N. O. Railroad Company did not pay me anything.

On cross-examination the witness testified:

I was sprinkling the track with oil and passed the place of the injury about half past 5 o'clock in the evening; I did not notice anything along there except simply the trees and bushes and such as that; I did not notice anything irregular; I saw no live animals, nor dead ones; I did not notice any dead animal lying there near the crossing.

Part of the bridge across the Sabine River belonged to the T. & N. O. and part of it belonged to the Louisiana Western, from the Texas line; there is a post near the east end of the bridge
174 that is called the state line post and my district runs up to that; up to that post. I look after that end of the bridge extending to the post and the T. & N. O. looked after the other; the Louisiana Western Railroad Company does not keep the bridge in repair; the Texas & New Orleans Railroad Company keeps it in repair.

FRANK P. DAVIS, a witness for defendants, being duly sworn, testified as follows:

I reside in Lafayette, Louisiana; I am stock claim agent of the Louisiana Western Railroad Company and the Morgan's Louisiana and Texas Railroad Company, and occupied such position in the year 1905 and prior to that time. My duty in that position was to settle stock claims, look into them, and handle everything pertaining to the stock business. In making my investigations and in the adjustment of claims for stock killed and injured on these Louisiana railroads, I have occasion to receive and consider the reports of such accidents sent in by engineers and firemen; I received all of those reports; they came to me as claim agent, from the master mechanic, J. P. Nolan, located at the shops in Algiers, La.; these reports are made out and sent to him by the engineers operating engines on the Louisiana Western Railroad Company, and he, in turn, sends them to me; and this was the course of business during the year 1905 and prior thereto. During the year 1905 I received, as claim agent, a good many reports of killing and injuring stock on the railroad between Lafayette and Echo. I recognize the three reports here now exhibited to me by counsel for defendants, as stock killing reports, made out and signed by William Miller and Corley Gross, as engineer and fireman. These are made out on

the regular form furnished and required by the company and according to its usages. These three reports were sent to me from the master mechanic's office, Mr. Nolan, at Algiers; he is the master mechanic that engineers operating on the railroad between
175 Echo and Lafayette would report to and are required to report to. These reports belong to my custody and were in my custody until turned over to the attorneys in this case, and I recognize and identify them as reports from my files.

In this connection the defendants offered and introduced in evidence the three stock killing reports referred to and identified by the witness Frank P. Davis in his testimony, true copies of which read as follows, to-wit:

*"Trainmen's Report of Stock Killed or Injured.*

In all cases where Stock is struck, injured or killed, a report must be made at once to the Superintendent, giving full answers to questions.

Engineer and Fireman must sign the same report, certifying to the correctness of their answers.

1. Description of Stock—One cow Age about 9 years Color Red Condition Poor.
2. Train No. 6 Engine 252—Date Feb. 15th, 1905 Hour 8 A. M.
3. Was Stock struck Killed or injured? Killed.
4. Day or night? Day. Foggy or clear? Clear.
5. Was Stock struck on crossing or on station grounds? Neither.
6. Speed in miles per hour? 35. How many cars in train? 6.
7. Distance from nearest station? 3½ miles west of Sulphur Mine.
8. How far off was Stock when first seen? One Telegraph pole.
9. Track fenced on one or both sides? Both sides.
10. Were brakes applied? Yes.
11. Was Stock struck on straight line or curve? Straight line.
12. Was grade level, ascending or descending? Level.

176 REMARKS.—The above mentioned cow was standing out by to one side of Track & Run upon track just in front of Engine.

(Signed) W. MILLER, *Engineer.*
C. GROSS, *Fireman.*"

Across the face of this is written in ink the following: "M/C March 14/05."

*"Trainmen's Report of Stock Killed or Injured.*

In all cases where Stock is struck, injured or killed, a report must be made at once to the Superintendent, giving full answers to questions.

Engineer and Fireman must sign the same report, certifying to the correctness of their answers.

1. Description of Stock one yearling Age about 2 years Color Red and white Condition fair.
2. Train No. 6 Engine 1443 Date March 7th, 1905 Hour 10:24 A. M.
3. Was stock struck, killed or injured: Killed.
4. Day or night? Day Foggy or clear? Clear.
5. Was Stock struck on crossing or on station grounds? Crossing.
6. Speed in miles per hour? About 50 How many cars in train? 6.
7. Distance from nearest station? About 3 miles east of Crowley.
8. How far off was Stock when first seen? I did not see this yearling it run upon Track from left side.
9. Track fenced on one or both sides? Both sides.
10. Were brakes applied? No.
11. Was Stock struck on straight line or curve? Straight Line.
12. Was grade level, ascending or descending? Level.

REMARKS.—The above mentioned yearling was down in ditch on the left side of the track and Run up on Track just in front
177 of engine. I did not see it the fireman told me that engine struck a yearling.

(Signed) W. MILLER, *Engineer.*
C. GROSS, *Fireman.*

Across the face of this report is written, in ink, the following: "M/C March 31/05."

*"Trainmen's Report of Stock Killed or Injured.*

In all cases where Stock is struck, injured or killed, a report must be made at once to the Superintendent, giving full answers to questions.

Engineer and Fireman must sign the same report, certifying to the correctness of their answers.

1. Description of Stock one yearling Age about 2 years Color Red Condition good.
2. Train 5 Engine 1443 Date April 3rd 1905 Hour 4:33 P. M.
3. Was Stock struck, killed or injured? Killed.
4. Day or night? Day Foggy or clear? Clear.
5. Was Stock struck on crossing or on station grounds? private crossing.
6. Speed in miles per hour? 15 How many cars in train? 6.
7. Distance from nearest station? 1¼ miles west of Midland.
8. How far off was Stock when first seen? about 4 Telegraph poles.
9. Track fenced on one or both sides? Both sides.
10. Were brakes applied? Yes.
11. Was stock struck on straight line or curve? Straight line.
12. Was grade level, ascending or descending? Level.

REMARKS.—There was 3 or 4 head of cattle by side of Track and I applied the Brake & whistled some went on one side of Track
178 & some on the other & this yearling Run upon Track from left side just as eng- came to crossing.

(Signed) W. MILLER, *Engineer.*
C. GROSS, *Fireman.*"

Across the face of this report is written, in ink, the following: "M/C April 15/05."

W. S. Cox, a witness for defendants, being duly sworn, testified:

My name is W. S. Cox; I reside in Houston, Texas; I am Master Mechanic of the Texas & New Orleans Railroad Company and have occupied this position for the past 9 years. I am personally acquainted with William Miller, deceased, and Corley Gross, deceased, who were engineer and fireman; I have knowledge of the history of Mr. Miller's connection with the railroad service, as engineer. He became a regular passenger engineer on January 30th, 1905; as a regular passenger engineer he was in what we term the "pool" between here and Lafayette—first in and first out. This arrangement was a matter of contract between the companies and the Brotherhood of Locomotive Engineers. What I mean by this is, say, we have ten or twelve men and there are 10 or 12 runs; the men running first in and first out of Houston, say for instance, you get a 48 hour lay over and then you take your turn out, in the meantime there is a man goes out on the regular every day, filling the vacancy of every passenger run, going and coming.

I recognize the instrument which is shown to me by counsel as a personal record of Mr. William Miller; it is dated August 17th, 1889, Louisiana Division. That was what was called the Louisiana Division of the old Southern Pacific at that time, it was made about the time when the Southern Pacific Company had these different
179 lines in Louisiana and Texas leased. There is an agreement between the Brotherhood of Locomotive Engineers and the company whereby the company had a right to employ 50 per cent. of the men and would promote the other 50 per cent. from the Brotherhood of Firemen. There was and is a written agreement of contract that was entered into and existing prior to the time of Miller and Gross's employment, on the part of the different companies of Texas and Louisiana, represented by their respective officers, and the Brotherhood, along about February 1st, 1903, expressing the terms, privileges and rights of the different men employed as engineers and firemen. The same agreement was made on behalf of the Brotherhood with each of the Louisiana Railroad Companies and the Texas Railroad Companies, being signed for each of these several railroad companies by their respective officials.

Prior to the time of taking the regular passenger run between Houston and Lafayette, on January 1st, 1905, William Miller did not have any regular run, but afterwards had the regular run that was called the local, applying between Houston and Beaumont and between Houston and Echo; that run involved freight service and

on that run he did not go upon the Louisiana Western at all. He afterwards left this local freight run voluntarily and went back into what is called the "Pool." His idea in that was to give him an opportunity to get the extra passenger run between Houston and Lafayette in case any of the regular men laid off. This regular passenger run which he finally accepted January 30th, 1905, involved the through run between Houston and Lafayette, and this regular passenger run was ordinarily styled and considered among the Brotherhood of Engineers, to which Mr. Miller belonged, a preferred run. While he held himself in position to make the extra passenger runs and whenever he made these extra passenger trips, they would carry him across the state line and upon the Louisiana Western Railroad to Lafayette and back. In other words,
180 as extra man he filled the place of a regular man assigned to the passenger service between Houston and Lafayette. Ordinarily the engineers and firemen regarded this run between Houston and Lafayette as a preferment and advantage over the local run between Houston and Echo.

I knew Mr. Miller and Mr. Gross personally and dealt with them in connection with the service, and know personally that there was never any disposition on the part of either of them not to make the through run over the Lousiana Western Railroad Company and its railroad, as well as over the T. & N. O. railroad between Houston and Echo. This arrangement and run was preferred by them. Under the terms of the Brotherhood contract between the Brotherhood of Engineers and Firemen and the several railroad companies over whose lines, respectively, they operated, and according to the agreement with the company, it was optional with the engineers and firemen, including Miller and Gross, whether they would take the run of their choice or not. For instance, if a man was on a local run between Houston and Echo and he, according to his rank and order, was the next man for a passenger run, which was a preferred run, it was left to him, under the contract, whether he chose that preferred run or not, and his declining or failing to take the preferred run in the service, did not in any degree affect his seniority rights in the future for such a run when there was another opening.

I recognize the printed instruments shown to me by counsel. One of them is a contract containing terms and rules and regulations of employment between the Brotherhood of Locomotive Engineers on the one part, and the Galveston, Harrisburg & San Antonio Railway Company, the Texas & New Orleans Railroad Company, the Galveston, Houston & Northern Railway Company, and New York, Texas & Mexican Railway Company, the Gulf, Western & Pacific Railway Company, the Louisiana Western Railroad Company and the Morgan's Louisiana & Texas Railroad and Steamship
181 Company, on the other. This became effective February 1st, 1903, and has been in force since said date.

The other instrument shown me is a similar contract between the Brotherhood of Locomotive firemen and the same companies, with reference to the terms, rules, and regulations to prevail in the em-

ployment of firemen in the services of said companies, or any of them.

The contract of the Brotherhood of Locomotive Engineers here exhibited and identified by the witness was signed by the Brotherhood of Locomotive Engineers, by S. M. Carter, Chairman, and Charles W. McCoy, Secretary, and for the Railroad Companies by W. G. Van Vleck, for the Texas lines and T. Fay, for the Louisiana lines; and the other contract is signed regularly by the Brotherhood of Locomotive Firemen, by its authorized officers, and by W. G. Van Vleck and T. Fay for the Texas and the Louisiana lines, respectively.

In this connection the defendant offered and introduced in evidence Article XIII, Subdivisions C. D. and E, and I and N, which read as follows:

"(c) An engineer with seniority rights on any division, accepting an official position in the service of the Company, or being exclusively employed by the Brotherhood of Locomotive Engineers, on the lines of these Companies, retains, in either case, his seniority rights. If road engineers are set back on account of slack business, they lose, thereby, none of their seniority rights.

"(d) All permanent, vacant or open runs shall be bulletined for ten days; provided, the senior engineer or engineers of the division do not make application for said run or runs prior to the ten days' limit; but, in case the senior engineers make application for the runs, he or they shall at once be assigned and bulletin withdrawn.

In case a run remains bulletined for ten days, and no applica-
182 tion is made therefor, the junior engineer of the division shall be assigned.

"(e) An engineer refusing a run vacant or open to his choice, by reason of his seniority right, forfeits thereby no seniority rights, but cannot, thereafter, claim the run refused, except in case of it being again vacant, or in case he is thereafter deprived, through no fault of his own, of a run which he holds.

"(i) Engineers on branches, or engineers found employed on roads acquired or leased, and thereafter operated as part of any division of Companies, shall lose thereby no seniority rights."

"(n) All previous agreements are hereby annulled. Either party desiring to change any of the foregoing rules or regulations shall give the other thirty days' notice of such desire, in writing, and of the change desired."

And the defendants in this connection also introduced provisions in the contract of the Brotherhood of Locomotive Firemen, above mentioned, which read the same in their relation to the seniority and other rights of firemen, as those above quoted with reference to engineers.

And thereupon the witness continued his testimony as follows:

Under the terms and regulations of these contracts, and according to the provisions quoted, while Mr. Miller or Mr. Gross had what you call the local run simply from Houston to Echo or Beau-

mont, with a freight, in the order of his seniority, if an opening was made for another engineer or fireman on account of the death or resignation of some one, to go with a passenger run regularly from Houston to Lafayette and return, and if Miller or Gross did not want such a run, it being then open to him and should decline
183 to take it, according to the terms of this contract he was at perfect liberty to decline the advanced position without being deprived in any sense of his seniority rights to accept the through run whenever there might be another vacancy of that sort, and if either the engineer or fireman in the position of Miller or Gross had lost the position that he held, through no fault of his, he would nevertheless be entitled to take and receive such position on the through run as his seniority rights would entitle him to even to the extent of displacing a man already on that run who was of lower seniority.

The Louisiana Western Railway Company paid Miller and Gross for their services in operating the engine between Echo and Lafayette, on the Louisiana Western Railway; the Texas & New Orleans Railroad Company did not pay them any portion of their wages for their services performed on the Louisiana Western Railway. The Texas & New Orleans Railroad Company, and it alone, paid them their wages for services on its railroad from Houston to the state line. Miller and Gross reported to and were directed by the officials of the Louisiana Western Railway Company in reference to and connection with that company's railroad, in operating trains from Echo to Lafayette, and not to the officials of the Texas & New Orleans Railroad Company; and in connection with their work in the operation of trains on the railroad of the Texas & New Orleans Railroad Company, they reported to and were directed by the officials of the latter company alone. When an engine belonging to the Louisiana Western Railroad Company, while in use on the T. & N. O. Railroad, required repairs, and it was more convenient to take it into the T. & N. O. shops at Houston, we would bill against the Louisiana Western Railroad Company for the expense; and if one of the Texas & New Orleans Railroad engines for convenience was repaired in the shops of the Louisiana Company at Algiers, that company would bill for the expense against the Texas & New Orleans Railroad Com-
184 pany, and it would be thus discharged. The expenses of fuel and lubricating oil and expenses of that sort used for these through runs, was prorated between these two companies and paid by them according to the number of miles made by the engine on the railroads of the companies, respectively.

Mr. Miller was a member of the Brotherhood of Locomotive Engineers and co-operated in the agreement made, and in his employment and in his relation to the railroad companies, respectively, acted upon this contract as the basis of his employment and relation; but independently of his membership in the brotherhood, his right to the privileges and regulations of the agreement, in any event, would be protected. It was a fact well known to Miller and to Gross, at all times, in the beginning and during their employment on this through run between Houston and Lafayette,

that the Louisiana Western Railroad Company would pay them directly for their services while working and operating for it over its line of railroad, and that the T. & N. O. Railroad Company would compensate them for their services while engaged in operating trains and working for it on its railroad; and that neither of the companies would pay any portion of the wages to them for services on the railroad of the other. This fact was well known and acquiesced in by both of them and was not concealed when they accepted this through run between Houston and Lafayette, as a promotion in the service; and neither of them ever made any complaint or objection to me to the through run or the method of compensation for their services. On the contrary, this run and this arrangement was desirable to them and was preferred by them.

I am familiar with the signature of William Miller on the check exhibited to me and recognize his genuine signature of endorsement on same. (The check here referred to is the one introduced in connection with the testimony of Mrs. Fannie L. Miller, covering the wages of William Miller, as engineer on the Louisiana Western Railway Company, for the month of April, 1905.)

185 I am thoroughly familiar with the signature of William Miler; have seen him right in my office a thousand times while acting as engineer, while I was master mechanic. The three documents exhibited to me, purporting to be stock reports, are signed by the genuine signature of William Miller, deceased. The documents here referred to are the stock reports identified and introduced in connection with the testimony of the witness F. P. Davis, and copies of which are hereinbefore inserted in connection with said witness's testimony.

Upon cross examination the witness testified:

I do not know anything about any arrangement between the T. & N. O. Railroad Company and the Louisiana Western Railroad Company prior to the death of Miller, about the use of each other's cars; that is not in my line of business; I know nothing of the cars. I only know of the engines. I do not know of any written agreement in reference to the cars or engines. I know that the T. & N. O. Railroad Company would sometimes run its engines from Houston to Lafayette and return, and that a portion of such runs would be over the Louisiana Western; and it is also true that the Louisiana Western Railroad Company would let its engines be run in the passenger service from Lafayette to Houston. There were 12 engines in the passenger service, and the Texas & New Orleans Railroad Company owned three of them, and the Louisiana Western Railroad Company owned three of them, the remainder of the 12 belonged to the Galveston, Harrisburg & San Antonio Railway Company—the other 6. The Galveston, Harrisburg & San Antonio Railway Company's engines that were — kept in Houston and were run on the Louisiana Western and T. & N. O. Railroads. Houston was the point at which all of these engines were repaired. I do not know how the compensation for the use of the engines on the different lines was arranged; I think our auditor could give you figures on that question; I am not familiar with it and I could only tell you

how they are prepared and distributed, but when it comes to
186 the handling and distribution of the engines with reference to rentals, etc., I do not know. I know how the employés operating these engines were paid; they were paid for so many miles covered on the T. & N. O. Railroad and the same way for service on the Louisiana Western Railway; they were paid so much a trip; this was divided between the companies on a mileage basis, prorated according to the miles. The distance between Houston and Echo is 111 miles, and the distance from Echo to Lafayette, I think is about 107 miles. It takes a little longer to run from Houston to Echo than it does to run from Echo to Lafayette; it did not necessarily happen that an engineer would start out from Houston and be delayed so that in fact he spent a much longer time on the T. & N. O. than was usual; it occasionally so happened if she should break down, and that afterwards he would go ahead and make his run over the Louisiana Western in the usual time. In that sort of a case the engineer might spend considerably more time in the service of the T. & N. O. than he did in the service of the Louisiana Western, and in such a case, while each company would pay the employés on the mileage basis for the service performed on their roads, respectively, yet the company on whose line the time was lost would have to pay the employés extra for the over-time; and in the case mentioned, where the delay was caused on the T. & N. O., the T. & N. O. would be responsible for and would pay the employés for the time lost. I mean to say that if the engineer lost time on the T. & N. O. track and was able to make it, or some of it up on the L. W., he would receive extra compensation for the time lost on the T. & N. O. Echo is the terminal, and in as much as he got to Echo late, being detained one hour and a half over-time, he cannot make up an hour and a half on the L. W. division, and the T. & N. O. would have to pay him the over-time that he would be entitled to. Where there is overtime on a
run, we pay the engineer or firemen, both freight and passen-
187 ger, so much per mile, and if he is detained on the road, say 40 minutes over the schedule of the train, he gets an hour for it, if he is detained less than a half an hour, say 20 minutes, he gets nothing for it. In order for lost time to count, it must be at least 30 minutes; if it is just 30 minutes then he gets an allowance for an hour. This basis exists as a matter of agreement and contract between the companies and the Brotherhood of Locomotive Engineers and Firemen.

The running repairs that we make on the T. & N. O. are handled exclusively on that road. If the engine runs through in joint service, that is, over the T. & N. O. Railroad and the Louisiana Western, then the Louisiana Western stands her pro rata of those running repairs, and this is calculated on the mileage basis. If one of the T. & N. O. engines becomes defective, while on the Louisiana Western Railway, it is nevertheless brought into Houston and repaired; if they be ordinary repairs, such as we frequently have, the expense of same is prorated according to the mileage on the railroads of the companies, respectively; each one stands its part of the proximate expense; and for the purpose of such

ordinary repairs, it is immaterial on which railroad the engine is when the defect shows up; the expense of such ordinary repairs is prorated just the same.

On redirect examination he testified:

The time of the Engineers and firemen on these through runs for the service, between Houston and Echo is handled through the Superintendent of the T. & N. O. Railroad Company, and the time of these men on these through runs while they are on the Louisiana Western Railway, from Sabine River to Lafayette, is handled through the office of the Superintendent of the Louisiana Western Railway Company, with headquarters at Lafayette. I personally have no supervision over the accounts concerning these various expenses of supplies and repairs, and know nothing personally
188 of them; they are looked after by the auditors of the companies. In my department we simply keep account of the repairs and supplies and turn in the charges to our shop clerk and he sends them to the auditor. When we have repairs made on engines we itemize them and turn them over to the shop clerk and they are passed to the auditor's office and charged to the proper accounts. Those are details which I am not familiar with, but I know they are made on the mileage basis.

G. R. Cottingham, a witness for defendants, being duly sworn, testified:

I am secretary and auditor of the Galveston, Harrisburg & San Antonio Railway Company and the Texas & New Orleans Railroad Company, and have been auditor of these two companies since June 1st, 1905; I think I was elected secretary some time in the month of June. I have no connection with the Louisiana Western Railroad Company or the Morgan's Louisiana and Texas Railroad and Steamship Company,—never had. I was general book-keeper for the Galveston, Harrisburg & San Antonio Railway Company and the Texas & New Orleans Railroad Company from the year 1894, in fact I commenced work in the auditor's office in the year 1892 here in the City of Houston and have been connected with that work ever since. I remember that when I first began to work in connection with the properties of these companies, they were under lease to the Southern Pacific Company; that was back in 1888; the operation under this lease was terminated July 1st, 1889. As secretary I am the custodian of and have the books of that period and since. I have the minute books containing the resolution terminating the lease of the Southern Pacific Company. Since the termi-
189 nation of that lease and up to the present time, the railroad and other properties of the Texas & New Orleans Railroad Company have been managed and operated by its own officers and for its own account. Some of these officers are appointed and some are elected by the Board of Directors. This was the case in the year 1905 and prior thereto and has been since and according to my knowledge and understanding. This company, the Texas & New Orleans Railroad Company, through its own directors and officers, has managed and

operated its properties for its own account since the abrogation of the Southern Pacific Company lease, above mentioned. I know very little of the arrangement or operation of the Louisiana Western Railway Company and its property in Louisiana except in a general way. The railroad of the Texas & New Orleans Railroad Company extends from the City of Houston, in Texas, to the Sabine River, and from Sabine Pass, Texas, to Dallas, Texas, and there is a branch line down to Port Arthur. The east and west line of its road extends from Houston to Sabine River. There is a little piece of road and track extending from the Sabine River to Echo that is now owned by the Texas & New Orleans Railroad Company; it was formerly known as the Louisiana Western Extension and was constructed and owned formerly by a Texas corporation known as the Louisiana Western Extension Railroad Company, but some years ago this was acquired, with legislative permission, by the Texas & New Orleans Railroad Company, as part of its road, and was so owned by it during the year 1905 and prior to June of that year. The railroad line of the Texas & New Orleans Railroad Company, as it now exists and did during the year 1905, goes to the Texas state line on the east, about the middle of the Sabine River, in fact, the middle of the draw span is where it is considered that the Texas & New Orleans Railroad ends.

In the case of those firemen, engineers, conductors, and other members of the passenger crews who made the through
190 run from Houston to Lafayette and return, using the same coaches and the same engines all the way through, the Texas & New Orleans Railroad Company paid these employés simply for services on the Texas & New Orleans Railroad, according to their slips turned in, showing the extent of their service on it, and the Texas & New Orleans Railroad Company did not pay them anything for their service on the railroad of the Louisiana Western Railroad Company nor for their services in behalf of that company; the accounts and pay rolls for these matters are and have been handled in my office, as auditor of the Texas & New Orleans Railroad Company, and I do not now, and have never had, anything to do with the accounting or payment of these employés for their service on the Louisiana Western, or after the trains leave the line of the Texas & New Orleans Railroad Company.

I have in my files and before me the time rolls for Mr. William Miller, engineer, for the months of April and May, 1905, for the services performed during those months on behalf of the Texas & New Orleans Railroad Company. These rolls simply show the different trips and services performed by him between Houston and Echo, between Houston and Beaumont, or Beaumont and Echo, and there is nothing shown or accounted for on these rolls beyond Echo, or for any service whatsoever in the state of Louisiana, and I have kept in my office, as auditor, no other account of his services during those months; they are all that came through my office and all that I have anything to do with; for the other months of Mr. Miller's and Mr. Gross's services the pay rolls

were kept the same way. In my office as auditor I never had anything to do with the pay rolls concerning the services of Mr. Miller or Mr. Gross between the time that they would leave Echo, going into Louisiana, or until they got back and entered again their operations and service on the railroad of the Texas & New Orleans
191 Railroad Company, and had nothing whatsoever to do with the pay checks received by them for their services on the Louisiana line.

The method of charging and making accounts for repairs on the engines or cars, or for the use of engines in the event an engine of the Louisiana Western Railway Company or the T. & N. O. Railroad Company should be used for the through trip, was, up to a short time ago, to divide the cost of repairs to an engine on the basis of the mileage made by that particular engine; if it made 100 miles on the Louisiana Western and made 100 miles on the T. & N. O., and there were any repairs necessary, the expense for that was charged half and half. In reference to the freight charges and passenger fares collected for the carriage of freight and passengers over parts of the two lines, the profits realized and the losses, if any, incurred incident to the business were not divided at all between the two railroad companies. The Texas & New Orleans Railroad Company receives compensation for what it transports and has nothing whatever to do with the freight collections or passengers fares earned by the Louisiana Western Railroad Company, and there is no difference in regard to these matters between the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, from the methods of any other two railroad companies which are entirely distinct. There is no more sharing of losses and profits of joint business handled by these two railroad companies, than there is between the T. & N. O. and the Gulf, Colorado & Santa Fe, or any other independent line that is a connecting carrier.

Mr. T. Fay, I think is General Manager of the Louisiana Western Railway Company, though I am not sure of that. To my certain knowledge Mr. T. Fay has not, for the last three or four years, held any official position with the Texas & New Orleans Railroad Company, and has not since I have been connected with this company, and I have been connected with this company since a date prior to 1905. I have before me the original minute book of
192 the Texas & New Orleans Railroad Company which was kept in 1889, and find entered therein a resolution indicating the termination of the lease formerly had over this company's properties by the Southern Pacific Company.

In connection with this witness's testimony, and as part of it, defendants here offered and introduced in evidence said resolution, as the same appears in the minutes, reading as follows:

"Whereas the Southern Pacific Company has notified this company that it will as requested by this company surrender to it the properties leased to the said Southern Pacific Company by indenture of lease dated Feb. 10, 1885; the said surrender of lease to take

effect at midnight on June 30, 1889, as the said leased properties may then exist. Therefore Resolved:

"That the surrender to the Texas & New Orleans Railroad Company by the Southern Pacific Company of the lease dated Feb. 10, 1885, to take effect at midnight June 30, 1889, as the said leased properties may then exist is hereby accepted by this company and the executive officers of this company will regard said lease as terminated from and after midnight June 30, 1889."

On cross examination the witness testified:

As to how that lease contract happened to become abrogated, I can only state from hearsay, I was not an officer of the company at the time it was abrogated July 1st, 1889; I cannot say where the election of officers of the T. & N. O. is directed from; they are selected at regular elections held by the directors and stockholders. The Southern Pacific Company is the biggest stockholder and naturally they could elect whatever directors they desired. Of course
193 the Southern Pacific Company votes its stock and it is the majority stock-holder. If we have any large net income for the T. & N. O. Railroad Company, we would send it to the assistant treasurer in New York, this is Van Deventer; he is assistant treasurer of the Texas & New Orleans Railroad Company and is treasurer of the Southern Pacific Company; he is regularly elected assistant treasurer of the Texas & New Orleans Railroad Company; he lives in New York, at 120 Broadway. The general auditor of the Southern Pacific Company is Mr. Young, and he has been so for 5 or 6 years. Mr. Young has no relation whatever to the Texas & New Orleans Railroad Company and holds no official position with it. Acting for the Texas & New Orleans Railroad Company, we send to Mr. Van Deventer whatever surplus money we have on hand, that is, whatever we do not need for use, from our treasury in Houston, it is sent to New York; it is not subject to dividends. There have been no dividends declared by the Texas & New Orleans Railroad Company since 1894; the books of the Texas & New Orleans Railroad Company show this fact. We have sent some money up to the assistant treasurer since 1904, but it has not been divided out; I know this fact because I keep the books of the Texas & New Orleans Railroad Company here in Houston and I know what we have standing to our credit; it could not be divided out without notice to us, in fact it could not be divided out without action of the Board of Directors of the T. & N. O. Railroad Company; they could not declare a dividend without they acted on it. The surplus of money sent from time to time by the Texas & New Orleans Railroad Company is standing to its credit with the assistant treasurer; I can't say as to how the balance has run; sometimes we have to send to New York for money when we get short here we call on the assistant treasurer for whatever we need, and of course whatever balance stands there is to the credit of the Texas & New Orleans Railroad Company. The account with our assistant treasurer, Mr. Van Deventer, is kept just as the account with any other officer of the company, just as
194 the account with the treasurer here is kept; we have him charged with all the money we remit and give him credit for

all he remits to us. There has been no dividend declared by the Texas & New Orleans Railroad Company since 1894; that is the last one; if a dividend were declared they would have to prorate the fund among each stockholder in proportion to his stock; if it was a 5 per cent. dividned, each stockholder would get 5 per cent. on his stock. In the event of a dividend, I don't think *I don't think* each road would get anything; the Southern Pacific would get the dividend on whatever stock it owned, and all other stockholders would get dividends on the stock they owned.

With regard to repairs on the bridge over the Sabine River, the Louisiana line keeps up the east end approaches, and the Texas line keeps up the west end approaches; the draw span, if there are any repairs on that they divide the cost between the two companies, The Louisiana Western and The T. & N. O. Any repairs made on the draw span would be divided equally between the two companies, no matter which side it is in, because you cannot separate repairs to that particular span. I could not say as to whether the two companies both own that span together or not; I understand that they both keep up this span and divide the expenses equally. I keep here at my office an account of the payment of bills and expenses on the Texas & New Orleans Railroad.

Referring to the printed folder by Cummings & Son, displaying the Sunset Route, I should judge the cost of printing that would be divided up between the lines east of El Paso. We have had several bas*i*s for dividing expenses of that character; some on the mileage basis, some on the train mileage, and some on the earning basis. Without referring to the particular voucher covering that, I cannot say what basis was used. That was the custom in 1905 and prior to that time and since; In speaking of the roads east of
195 El Paso I mean the T. & N. O., G. H. & S. A., Louisiana Western and Morgan's Louisiana & Texas. In joint expenses, or expenses incurred for the benefit of all of them,—advertising a through route—would be divided up on some agreed basis. I would not call that a community of interest, but they had this agreement. I understand that they advertise rather extensively in magazines and newspapers in the east; personally I am not familiar with that feature of it; possibly the T. & N. O. paid part of the expense, but I cannot recollect any individual payment made by it for such purpose. Speaking generally I would say that we paid our proportion of such cost; I cannot say whether it was on mileage basis or on gross earnings or train mileage basis, it was on some agreed basis; I cannot carry all of these things in my head, so as to say just what particular basis we used on any particular division of expense; some of it was on the mileage basis. A matter of that kind would be agreed to between the traffic representatives of the different roads, for instance our traffic man would agree with the traffic men of the other roads on what basis advertising expenses should be divided.

The expense of repairing engines in 1905 was prorated on the basis of engine mileage and this was true in June, 1905, and prior to that time. Engine mileage means the mileage of the individual engine the mileage any particular engine would run. We keep

the repairs of that engine and of each engine separately. There are three classes of repairs to engines; First, running and shop and general repairs. The running repairs are based on the mileage the engine has made on the last trip; the shop repairs are based on the mileage the engine made since the last time in the shop; and the general repairs means the general overhauling, and is based on the mileage the engine has made since the last time it received general repairs. For the mileage of each individual engine, a report is kept and that was the way it was handled. You might repair an engine at the end of its run to-day and you could not say whether the
196 repairs were made necessary by this trip or some trip made a week ago.

In the case of this accident, where the engineer and fireman, who resided in Houston, were killed on the Louisiana Western Railway Company, in Louisiana, the Louisiana Western would have to pay all costs; any verdict for damages that is assessed, the accident having occurred on that road, they are responsible. If the accident had happened on the Texas & New Orleans Railroad, the Texas & New Orleans Railroad Company would pay it. This is a located accident.

In regard to goods lost en route, that is handled under freight association rules. All roads of the United States are working under certain rules and under certain conditions the loss is prorated, it depends on what the condition is, you have to establish first the seal record, and if it is an unlocated loss, there might be some reason why a certain road should have to pay the whole thing on account of its seal record being bad. If everything is ordinary, we would handle a loss between this company and the Louisiana Western just the same as between this company and the M. K. & T. or the I. & G. N., or any other road. If you cannot locate where such loss occurred, the two companies would have to pay it, sometimes on the mileage basis, sometimes on the revenue basis. By revenue, I mean based on the percentage which each road derives. There are a good many cases of lost goods which you cannot locate. There is no written agreement between these railroad companies; the basis of contract is the same understanding that we have with roads that we do business with. There is no written agreement between the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company regarding the use of the two tracks. I do not understand that the Texas & New Orleans Railroad Company ever had the Louisiana Western under lease. The Southern Pacific Company at one time had it under lease. I could not say how the trains were operated during that lease.

197 On redirect examination the witness testified:

There is and has been no contract between the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, contemplating an occurrence such as the wreck in question, where the employés were killed on the Louisiana Western Railway; that was clearly a Louisiana Western Railway proposition, and I make this as merely my own conclusion; I do not base it on any agreement existing between these two companies. What I mean is

that if a voucher was put to me for distribution of the sum paid out for such an accident, and it showed that the accident had occurred on the Louisiana railroad, and for some reason the voucher had to be paid promptly by the Texas & New Orleans Railroad Company, under the order of the court, and I had to make the distribution of that voucher, I would charge it to the Louisiana Western Railway Company, but I would not thereby be undertaking to fix the liability in case of such an injury on the line of either.

The Louisiana Western Railroad Company I understand to be an independent corporation and so is the Texas & New Orleans Railroad Company.

On further cross-examination the witness testified:

I do not know of any understanding in writing between the two companies under which an engine and a crew with a passenger train starts out of Houston and runs to Echo over the Texas & New Orleans, and from there continues on to Lafayette over the Louisiana Western. The manner of distributing this expense has been agreed upon from time to time between the different accounting officers and the operating men. I do not know anything about the original agreements. I presume the agreement would be made between the operating officers of the two roads; between the men who were
198 in charge of the operation, but I have never seen a written contract. If there was a written contract to that effect, I would have it in my possession. By the parties operating the roads I mean the general managers or the general superintendents of the respective roads. If there is any written agreement I do not know of it, and I have not been present when any verbal agreement was made. My testimony is simply based upon the method of conducting the business, and that has been since 1905.

The defendants next offered in evidence printed rules numbers 343 and 371, set out in the Book of Rules issued by and under authority of the Louisiana Western Railroad Company and the Morgan's Louisiana & Texas Railroad and Steamship Company, which book had formerly been used by plaintiffs in proving rules therefrom. Said rules read, respectively, as follows:

"343. When trains are equipped with air brakes, enginemen will be held responsible for the rate of speed; but when trains are not so equipped, or when the air brake fails to work, conductors must see that speed is controlled by brakemen using hand brakes. When hand brakes are used they should not be applied so as to cause the wheels of cars to slide, nor kept on so long as to heat the wheels; to avoid this the applied brakes should be frequently changed from one car to another."

"371. Great care must be taken to prevent killing live stock, bringing the train to a full stop if necessary. If any stock be killed, or struck, the engineman must report it in writing, on the prescribed form."

The defendants next offered and introduced in evidence
199 the plaintiffs' Original Petition, and the file marks thereon, in the case numbered 37282, entitled Fannie L. Miller et al. vs. T. & N. O. R. R. Company et al., which reads as follows:

"STATE OF TEXAS,
*Harris County:*

In the District Court of Harris County, Texas.

"To the Honorable Judge of said Court:

Your petitioners, Fannie L. Miller, George W. Miller, William D. Miller and Dorace H. Miller, plaintiffs, complaining of the Texas & New Orleans Railroad Company and the Louisiana Western Railway Company, defendants, respectfully represent:

I.

That the plaintiffs are all residents of Harris County, Texas, and resided in said county at the time of the injury hereinafter alleged, and the said George W. Miller, William D. Miller and Dorace H. Miller, are minors under the age of twenty-one years *of age*, and appear herein by their next friend, the said Fannie L. Miller, who is their mother. That the said Texas & New Orleans Railroad Company is a railroad corporation duly incorporated as such under the laws of the State of Texas and operating a line of railroad in the City of Houston, thence through a part of Harris county and other counties to a point at or near the Sabine River, and having a local agent residing in Houston, Harris County, Texas, to-wit: C. W. Sedgwick and having also its principal office in said Harris County, Texas. That the said Louisiana Western Railway Company is a railway corporation duly incorporated under the laws, of, to wit, the State of Louisiana, and that it is operating a line of railroad in said State of Louisiana and thence into the State of Texas from a point on the Sabine River to the station known as Echo in said State of Texas, and having also a local agent in Harris County, Texas, to-wit: C. W. Sedgwick.

200 II.

That the said defendant railway companies are now, and were at the times of the occurrence of all the matters and things hereinafter related, engaged in—and said matters and things arose from and grew out of—a joint partnership arrangement between themselves, by which, among other things, the stock of said two railway companies, or a large majority thereof, is owned or controlled in common by certain persons directing their affairs, and they solicit joint business and make through rates for the carriage of freight and passengers over both of said roads, and divide the profits arising therefrom and operate said lines as one continuous consolidated line between Houston, Texas, and a point in the state of Louisiana, to wit, La Fayette, and share between themselves the losses in operating said continuous line of railway, and use indiscriminately on one road or the other—as occasion or convenience may require—the engines, rolling stock and employees of each other, and each of them hiring and discharging employees for both of the lines of railway, and each of them requiring the employees engaged by it to render services on the line of the other company.

That their employees operating trains are required to make the continuous run from Houston, Texas, to La Fayette, Louisiana, over the lines of both railroads, though instructed to go through some formality of making out separate reports to each of the respective companies. That all of these facts and circumstances existed at the time of the occurrences hereinafter mentioned.

III.

That the plaintiff, Fannie L. Miller, is the widow, and her co-plaintiffs, said minors, are the children and only children of William T. Miller, late of Harris County, deceased. That the said William T. Miller was heretofore an employee of said defendant companies—engaged by both of them—under the arrange-
201 ment aforesaid as an engineer, operating a passenger engine for said companies, from the city of Houston to a point in the state of Louisiana, to wit: La Fayette, and in the course of his employment, as his duty required him to be, was on, to wit, the first day of June, 1905, in the night time, on an engine operated by said companies as aforesaid, drawing a train of passenger cars from Houston to La Fayette. That while in the discharge of his duty aforesaid, and in the State of Louisiana, on the line of said Louisiana Western Railway Company, near the station known as Sulphur, the engine on which he was riding collided with a bull or other animal on the track and was, because of the negligence and carelessness of said defendant companies, their agents and representatives in the particulars hereinafter stated, caused to leave the track on which it was running, and to jolt and jar and to fall from the roadbed or embankment on which said track was located and a quantity of hot oil used for generating steam was thereby caused to escape from said engine and onto the body of the said William T. Miller, and to shock, burn and wound him and cause his death within, to wit, a few hours thereafter.

IV.

That said injury and negligent killing of the said William T. Miller was caused proximately by the negligence and carelessness of the said defendants, their agents and representatives in this:

(First) That the line of said railway was fenced, and the presence of several head of cattle—one of which was the animal struck by said engine, causing it to leave the track as aforesaid—within the fence enclosing said line of railway was known to the said defendant companies, their agents and employees, especially the employees charged with the duty of reporting the presence of the same within said fence, for as much as to wit, seven hours before said animal was
202 struck by the engine upon which said William T. Miller was riding, but that said defendant companies, their said agents and employees, especially those having such knowledge as aforesaid, negligently and carelessly failed to report the same or to use any care to cause their removal from within said fence, or to notify said William T. Miller of their presence there, although one

head of said cattle was struck and killed by an engine near the same point about seven hours before the striking of said animal by said train upon which said William T. Miller was riding. That at all of said times there was a rule of said railroad company duly established and promulgated, making it the duty of every employee regardless of department, to report obstructions of any kind to the superintendent of the road on which the same happened, and if possible to the nearest section or bridge foreman, and also defining that anything which interfered with the safe passage of trains at full speed was an obstruction; also that the track must be kept clear and that it was the duty of foremen to turn out promptly with all their men and remove any obstruction whenever notified by trainmen and others, even though the obstruction might not be on their sections. Plaintiffs further allege that no notice whatever was given to said William T. Miller of said cattle within said fence and he had no knowledge whatever until about the same instant when said engine struck said animal.

(Second) That the ties supporting the rails at and near the point where said animal was struck by said engine as aforesaid, were old and decayed, and the sudden striking of said animal by said engine caused the rails to spread and the engine to leave the track, and that after partially leaving the track said engine was prevented from remounting the same and caused to leave the embankment because of said decayed ties, with the results hereinbefore alleged.

(Third) That the headlight to said engine was of an old style, burning acetyline gas and throwing a reflection for only
203 a short distance, and said William T. Miller was therefore not enabled to see said animal until too close to the same to avoid striking it, and the fact that only said protection in the way of light was afforded was known to the companies aforesaid when it failed to give any notice of said animals on the track or to make any effort to cause their removal.

(Fourth) That the pilot or "cow catcher" at the front end of said engine and which was for the purpose of lifting animals and like objects from the track so as to not cause a derailment by running over them, was equipped with a long bar or projection connected with or near the same and extending out from the direction of said engine and over said pilot to a point about even with the end of said pilot, and only a short distance above the lower edge of said pilot (near the roadway), and which projection was stationary in said position, thus causing animals or other like objects raised from the track by said "cow catcher" to be thrown back toward the same, instead of being lifted high above and off of the track, as would be the case without such projection. That said company in using a projection of this kind could and would in the exercise of ordinary care have so provided that said projection of this kind could and would have been raised back towards the engine and there secured out of the way when not in use for coupling cars thereto, but that said defendant companies, instead of using the most approved and safest appliances in this respect, negligently provided only the appliances above stated, and that said animal struck by said

engine was caused to be thrown down toward the track and said engine coming in contact with the same on said track was derailed, with the results hereinbefore explained. That the said William T. Miller had been engaged for only a few weeks in running an engine carrying a pilot equipped with such a projection, and at the time when he was riding upon the same as aforesaid did not know
204 of the danger attending the use thereof or of the negligence of said companies in this respect.

(Fifth) That the animal with which said engine collided as aforesaid strayed onto the right of way and track of said company through a gate which said company had caused or allowed to be built in the fence which enclosed its right of way and roadbed at and near the point where said collision occurred, and made no proper provision for keeping same closed or for keeping animals off of said right of way and roadbed at and near the point where said collision occurred, and made no proper provision for keeping same closed or for keeping animals off of said right of way, but negligently left the care of said opening to the owners and occupants of land adjoining said right of way, and the said William T. Miller had no knowledge that said company was negligent in this particular, and had every reason to believe and did believe that said companies caused the gate to be kept closed as against animals on said adjoining lands. That said gate was left open for a long period of time, to wit, twelve hours, and said animal along with others, strayed upon said track and was struck by said engine and caused its derailment, with the results hereinbefore explained.

V.

That the plaintiff at the time of his death was but forty-one years of age, healthy and vigorous and then, and for a long time prior thereto, earning, to wit, the sum of two hundred dollars per month in his avocation as railroad engineer. That of this amount, to wit, one hundred and fifty dollars per month was contributed to the care, maintenance and support of all of said plaintiffs, and to the education of said minors, and if said William T. Miller had not been so killed he would have contributed to their certain care, maintenance, support and education in the future, the sum of to wit, thirty thousand dollars.

Wherefore plaintiffs pray that defendants be cited according to law to answer this petition and that on hearing plaintiffs have
205 judgment for their damages aforesaid, to wit, said sum of thirty thousand dollars, and for an apportionment of the same between these plaintiffs as provided by law, and for costs and general relief.

(Signed) BRASHEAR & DANNENBAUM,
*Att'ys for Fannie L. Miller et al.*

Endorsed: No. 37282. Fannie L. Miller, et al., vs. T. & N. O R. R. Co. In the District Court of Harris County, Texas, 11th Judicial District. Plaintiffs' Original Petition. Filed November 22nd, 1905. Henry Albrecht, C. D. C. H. C."

The defendants next offered and introduced in evidence the following portions of the testimony of the witness HENRY P. DART, taken by depositions, to-wit:

"My name is Henry Plauche Dart. I reside at New Orleans, La.; am a lawyer; was admitted to the bar of Louisiana in New Orleans in February, 1879, and am still in the active practice, being the senior member of the law firm of Dart & Kernan; have enjoyed for many years, and still enjoy, a large practice in every branch of litigation, appearing before all the State Courts, the Federal Courts and the Supreme Court of the United States. During my whole professional life I have been constantly engaged in personal injury cases and have prosecuted and defended many such actions.

I believe I am able and qualified by knowledge and experience to state with substantial accuracy the law and the practice in the Courts of Louisiana in such cases.

There is no statutory or code provision in Louisiana on the subject of the relation of fellow servants, as a defence to the master.

206 The question came before the Supreme Court of Louisiana in May 1851 for the first time, and it was then decided that the master is not liable for damages resulting from the negligence of another servant, unless that other servant is habitually careless or unskillful. See Hubgh vs. New Orleans & Carrollton R. R. Co. 6 An. 495 to 514 (inc.). On its original hearing the court based its opinion upon the case of Priestly vs. Fowler, 3 M. & W. 1. On a rehearing the court rejected the Plaintiffs' demand upon the ground that no action was then permitted for the death of a human being, and the rehearing opinion did not touch upon the question of fellow servant, but the case has been often cited on the first proposition and that doctrine so often approved, that it is now part of the jurisprudence of Louisiana.

"I have in some of the following citations referred to cases where the question is discussed authoritatively. See also Weaver vs Logging Co., 116 La., 468, 40 So. Rep. 798, decided in March 1906. This case contains a restatement of the law of Louisiana as it now exists. Referring to the Hubgh case the court said, page 472: "The doctrine that the servant assumes the risks of his fellow servant's negligence was examined in the Hubgh case and has ever since been uniformly followed in the jurisprudence of this State. This doctrine is based on an implied agreement that the servant undertakes to run all the ordinary risks of the service, including the risk of negligence on the part of a fellow servant. Id. This rule of law seems to us to be reasonable and just, as otherwise the master might be held liable without any fault whatever on his part for an accidental injury by one servant on his fellow." * * *

I would answer further on the case stated that the engineer and fireman in the operation of the locomotive are fellow servants. See cases above referred to and Satterly vs. Morgan Louisiana & Texas

207 R. R. & S. S. Co. 35 La. An. 1166 and statements arguendo in the Towns vs. R. R. Co. case 37 La. An. 632. See also Jones vs. Southern Pacific Co. 144 Fed. Rep. 973.

The engineer Miller and the fireman Gross, accompanying each other and co-operating on the moving locomotive, were fellow servants, within the meaning of the laws of Louisiana prevailing and in force at the time of this wreck, so that neither of them could recover of the railroad company for injuries resulting from the negligence of the other. At the time of the wreck and derailment in question, there was no statute in the state of Louisiana on the subject of fencing railroads, and I know of no decisions of the courts of Louisiana requiring railroad companies having and operating railroads in the state of Louisiana to fence their railroads or tracks.

It appears that the Louisiana Western Railroad Company was incorporated by Act 21 of the Acts of the General Assembly of Louisiana for the year 1878 and was approved on March 30th of that year and is to be found printed and bound in the official publication of the Acts of the Legislature for the year 1878 on pages 258 to 268 (inc.). This act consists of ten closely printed pages, is accessible and is admissible in evidence under the laws of this state and I presume under the laws of Texas, in the form of its official publication, as above stated, and therefore I do not undertake to attach a copy of same to my answers.

I do not know of any amendment or alteration by the Legislature or any other authority, altering or eliminating the language or effect of section 17 of Act 21, of the General Assembly of Louisiana for the year 1878, above mentioned.

I am familiar with the Constitution of Louisiana of 1898. It contains the clause numbered Article 48, which reads as follows: "The General Assembly shall not pass any local or special law on the following specified objects: * * * creating corporations,
or amending, renewing, extending or explaining a charter
208 thereof. * * * Grant any corporation, association or individual any special or exclusive right, privilege or immunity.

I find a similar provision to this in the Louisiana State Constitution of 1879, numbered Article 46, adopted July 23rd, 1879. These two constitutions were not adopted and were not in force at the time of the passage of Act 21 of the General Assembly of Louisiana for the year 1878, creating the Louisiana Western Railroad Company. There was no such provision in the Louisiana Constitution of 1868, which was in force at the time of the passage of the Act of incorporation of the Louisiana Western Railroad Company, which was approved March 30th, 1878. This law of incorporation was passed under the dominion of the Constitution of Louisiana of 1868.

I have not convenient a spare copy of the Constitution of Louisiana of 1868, which was the Constitution existing on the 30th day of March, 1878, but you will find a printed copy thereof issued in the volume of the Revised Statutes of Louisiana, printed by authority of the State of Louisiana in 1870.

I am not counsel for the defendant company in any of the courts of the state of Louisiana, or elsewhere, or otherwise.

I am not aware of any case decided by our Supreme Court of Louis-

iana holding that the failure to fence a railroad might be taken into account by a jury in determining the question of negligence on the part of the railroad company, for an injury caused to a passenger or to an employé by the derailment of an engine or train.

I am not able to say that the rules of the common law as generally understood throughout the United States are looked to in Louisiana in determining questions of contributory negligence and assumption of risk in actions for personal injury brought by servants against their masters. I refer to my testimony already given here.

209 My understanding is that the Supreme Court determines in each case whether there is contributory negligence primarily as a matter of fact, and the rule is general that if on the whole case it appears that the accident would not have happened but for the negligence of the injured person contributing thereto, there can be no recovery. In considering this the doctrine of the "last clear chance" plays its part. I have already shown by references to the cases of Hubgh, Weaver and Duncan and other cases cited, that the servant is, as matter of law, supposed to assume the risk of personal injury, subject to the qualifications stated in these cases. The Evans and Merritt cases indicate this also. It is clearly stated in the Weaver case that the servant whose negligence is assumed as one of the risks of employment, is a person actually engaged on the same physical work with the injured person.

* * * * * * *

At the time the charter of the Louisiana Western Railroad Company was granted by the Legislature of Louisiana, in 1878, it had authority under the Constitution of Louisiana to create corporations by Special Act, a power which it frequently exercised, in fact it may be said to have been the public policy at that time.

Whether the provisions referred to are "special or exclusive rights, privileges or immunities" it would seem to me, is a matter of Judicial determination. In the absence of any provision in the Constitution of 1868 prohibiting same I would hesitate to pronounce the provisions in question to be in that category. In a legislative charter it would seem to me to be entirely within the province of the Legislature, unrestricted by constitutional limitations to grant, limit or specify the rights, duties, powers, etc., of its own creature. In this connection you will recall that the constitution of 1868, already referred to, is that Constitution under which the Acts were passed which are interpreted in the Slaughter House cases in the Supreme Court of the United States.

210 I am not aware of any decision construing this particular provision of the Charter of the Louisiana Western Railway Company. Other provisions of the same Statute have been passed upon by the Supreme Court, thus the provision giving that corporation the right to expropriate property by special procedure was recognized and enforced in La. Western R. R. Co. vs. Central & Improvement Company, 119 La. 927, 44 So. Rep. 732; also the special privilege in the charter of the Morgan's Louisiana & Texas R. R. & S. S Co., Act No. 37 of 1877 in regard to immunity from suit except at domicile was affirmed in Heirs of Gassin vs. Williams, et als. 36 La

An. 187 and St. Julian vs. Morgan's La. & Tex. R. R. & S. S. Co. 39 La. An. 1063.

I should consider the provision of Sec. 17 of the Act of 1878 incorporating the Louisiana Western R. R. Co. valid. I have indicated this opinion in a previous answer, and I add this additional reason, that the right to recover for such injuries being statutory in Louisiana, it would seem reasonable where the Legislature has the right to create a corporation by special act, that it would safeguard the grant or regulate or control rights or privileges under it, with the same validity that it could make the original grant.

I should consider the charter of the Louisiana Western Railroad Company as partaking of both characters, that of a private Act and a public law. It is unquestionably a law, but I am not aware of any decision holding that the courts would take official notice of it. I should consider it necessary to prove it in order to get it before the courts under our practice and law; in any event, that's the course I would follow if I were seeking to maintain it before our courts.

In the absence of decisions upon the subject, I should certainly plead and offer the statute if I were to defend the case. The proof of it in this state would be a mere matter of offering the
211 printed volume containing the Act, which is issued under the authority of the State of Louisiana.

I am not aware of any Constitutional provisions which nullify or neutralize the provisions of the Charter aforesaid. As to the effect of the Article of the Constitution of 1879 and 1898 of the state of Louisiana above referred to, I would not consider these provisions to have the effect of nullifying or neutralizing this charter."

The defendants next offered and introduced in evidence Act No. 21, incorporating the Louisiana Western Railroad Company, being an Act of the Louisiana Legislature of 1878, approved March 30, 1878, and published and printed on pages 258 to 268, inclusive, of said Acts, under authority of the State of Louisiana, and Section 17 of which Act reads as follows:

"SEC. 17. Be it further enacted, etc., That said company, its officers or employees, shall not be liable in any sum whatsoever of damages or costs in any action brought by any party against it, or them, or any or either of them, for any injury to the person, or loss of life, or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the part of said company, its officers or employees, and sustained by any person while riding or being transported, free of charge, upon its railroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any service as an employee of said company, or as an employee of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad,
212 or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all

such employees shall labor and render service, upon said railroad and upon all other railroads and transportation lines occupied and operated by said company, at their own risk, as to personal injury or loss of life, or loss or detention of, or injury to baggage, resulting from accident or alleged carelessness or negligence on the part of said company, its officers or employees, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

The defendants next offered and introduced in evidence the adjudicated cases and decisions and the reports thereof, as follows:

*Decisions in Support of the Immunity Provision of the Charter*

Louisiana Western Railway Co. vs. Central & Importing Co., 119 La., 927, 44 So. 732.
Heirs of Gassin vs. Williams, et al., 36 La. An., 187.
St. Julian vs. M. L. & T. R. R. & S. S. Co., 39 La., 1063.
Pecot vs. Police Jury, 41 La., 707; 6 So. Rep., 677.
Article 110 Louisiana Constitution, 1868.

Article 2315, Revised Civil Code of Louisiana, 1870, page 283, reading as follows:

"Art. 2315 (2294). Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother
213 or either of them, for the space of one year from the death."

Vredenburg vs. Behan, 33 La. An., 643.
Id. 37 La. An., 652.
Eichorn vs. Ry. Co., 112 La., 250; 36 So. Rep., 335.
Ry. Co. vs. Richards, 68 Tex., 375.

*On Fellow Servants.*

Hubgh vs. N. O. & Carrollton R. R. Co., 6 An., 495-514.
Weaver vs. Logging Company, 116 La., 468; 40 So. Rep., 798.
Bell vs. Globe Lumber Company, 107 La., 725; 31 So. Rep., 994.

The defendants next offered and introduced in evidence the Plaintiffs' Original Petition, and the file marks thereon, in the case of Felix & Theresa Gross vs. T. & N. O. Railroad Company et al., which reads as follows:

"THE STATE OF TEXAS,
*County of Harris:*

In the District Court of Harris County, Texas, — Judicial District, —— Term, 1906.

To the Honorable District Court of said County:

Now come Felix Gross and Theresa Gross, husband and wife, both of whom reside in Harris County, Texas, and are citizens thereof, who will be the plaintiffs herein, and complain of the Texas & New Orleans Railroad Company, the Louisiana Western Railway Company and the Southern Pacific Company, defendants herein, and respectfully represent that the defendant, Texas & New Orleans Railroad Company is a railroad corporation, duly and legally created and existing under and by virtue of the laws of the State of Texas and that the defendant Louisiana Western Railway
214 Company is a foreign corporation, domiciled in the State of Louisiana, owning and operating an extensive line of railway and doing business and having a local agent resident in — upon whom service of citation may be had in this suit; and that the Southern Pacific Company is a foreign corporation operating a system of railways including the lines owned by the Texas & New Orleans Railroad Company and Louisiana Western Railway Company. That the defendant, Texas & New Orleans Railroad Company owns and operates an extensive line of railway in Harris County, Texas and is doing business and has a local agent resident in said county, upon whom service of citation may be had, and for cause of action respectfully represents:

I.

That heretofore to-wit, on or about June 1st, 1905, said defendants were engaged in some kind of a joint partnership arrangement between themselves, the exact details of which are unknown to plaintiffs, by which arrangement, among other things, the large majority of the stock of the defendants is owned or controlled in common by certain persons directing their affairs; that they solicit joint business and make through rates for the carriage of freight and passengers over both of said roads, and divide the profits arising therefrom, and operate said lines as one continuous consolidated line between Houston, Texas, and a point in the State of Louisiana, to-wit: La Fayette, and share between themselves the losses in operating said continuous line of railway, and use indiscriminately on one road or the other as occasion may require the engines, rolling stock and employés of each other, and each of them hiring and discharging employés for both of said lines of railway, and each of them requiring the employés engaged by it to render services on the line of the other company. That their
215 employés operating trains are required to make the continuous run from Houston, Texas, to La Fayette, Louisiana over the lines of both railways, though instructed to go through some formality of making out separate reports to each of the respective

companies, which is done solely for the purpose of defeating the jurisdiction of the state courts.

That on or about said date while defendants were operating under said arrangements, plaintiffs' son, to-wit: Corley Gross, deceased, was in the employ of defendants in the capacity of fireman on a locomotive of a passenger train on the run from Houston, Harris County, Texas, through Calcasieu Parish, to La Fayette, Louisiana. That on or about said date, said Corley Gross had left Houston with said train, about seven twenty P. M. on the night run, and had arrived or proceeded to within about seven miles of Sulphur Mines, Louisiana, at about eleven forty P. M., and was proceeding at the usual rate of speed when the engine struck a beef or other animal lying on the track, and the engine and several cars were thereby derailed and turned over, and as a result thereof a great quantity of steam or hot water or hot oil confined about said engine, was permitted or caused to escape and plaintiffs' said son Corley Gross was thereby scalded and burned to such an extent, that he died therefrom about two weeks later. That the said Corley Gross was burned and scalded on the head, face, neck, arms and body in the most horrible manner, and the flesh thereof was cooked and caused to fall from the bones, and that for about two days prior to his death he was caused thereby to suffer great physical pain and mental anguish, and that he lost or was deprived of the possibility of making future earnings as well as all other benefits of life.

## II.

Plaintiffs allege that the death of their said son was directly and proximately caused and occasioned by the negligence and
216 carelessness of the defendants, their servants, agents and employés, in the following respects, to-wit:

(*a*) In that they negligently and carelessly permitted cattle to get and remain upon defendants' right of way and upon their track, in said Calcasieu Parish, Louisiana, and thereby caused said derailment;

(*b*) In that, their right of way was not kept properly enclosed, and the gates of the enclosure properly closed, so as to prevent cattle from getting upon said right of way and track;

(*c*) In that, defendants knew or had notice of such defective conditions of their enclosures and that said beef or animal as well as others were upon their right of way and track several hours before the accident, or it was their duty to know it, and negligently failed to remove the same.

That plaintiffs' son did not know that said cattle would be permitted to get and remain upon said right of way and track, and cause said derailment and that plaintiffs' son was injured without fault or neglect on his part.

(*e*) In that, the ties supporting the rails at the place of said accident were old, rotten and defective and permitted the rails to spread and said engine to leave the track and turn over as aforesaid.

III.

Plaintiffs allege that the said Felix Gross is the father and Theresa Gross is the mother of said Corley Gross deceased. That the said Corley Gross had no wife nor descendants. That said Felix Gross was —— years of age and said Theresa Gross was —— years of age, and that their said son Corley Gross, deceased, at the time of his death was a strong and healthy man, twenty years of age, and earning and capable of earning one hundred dollars per month, of which amount more than seventy dollars per month was contributed to the support of his said father and mother, and he would con-
217 tinue to have contributed said amount to their support as long as they both lived, or either of them. That said Corley Gross left no widow nor children surviving him, having died unmarried. That by reason of the death of their said son these plaintiffs have suffered a pecuniary loss in the sum of twenty five thousand dollars.

Plaintiffs further say that under the Statutes of the States of Texas and Louisiana the cause of action which Corley Gross had against defendants for said injuries sustained by him, as aforesaid, survived to his said mother and father, the plaintiffs herein.

The premises considered, the plaintiffs pray that the defendants be cited to answer this petition, and that upon final hearing they have judgment against the defendants for the amount of their said damages, as aforesaid, for all costs of suit, and for general relief, and for such they will ever pray.

(Signed) LOVEJOY & PARKER,
*Att'ys for Plaintiffs.*

Endorsements: No. 39491. In the District Court of Harris County, Texas, 55th Judicial District. Felix & Theresa Gross, Plaintiffs vs. T. & N. O. R. R. Co., et al., Defendants. Plaintiffs' Original Petition. Filed March 31st, 1906. Henry Albrecht, C. D. C. H. C. By W. A. Powers, Deputy."

The defendants here rested.

*The Plaintiffs' Evidence Offered in Rebuttal.*

218 The plaintiffs offered and introduced in evidence the following testimony of the witness HENRY P. DART, taken by depositions:

"The local statute which governs actions for personal injury is as stated in the answer to the last interrogatory. As it exists today the same will be found printed in Merrick's Annotated Edition of the Revised Civil Code of Louisiana as Article 2315, page 559, and it is in the following language:

Article 2315: Obligation to repair damage caused by wrongful acts; survivorship of action. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either

of them, and in default of these, in favor of the surviving father and mother or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

The State Courts of Louisiana recognize and resort to the foregoing statute as the basis of authority for all cases involving actions or claims for personal injury. There is no law or authority for such an action in the courts of Louisiana, other than the Article of the Civil Code aforesaid and the amendments thereto. The Civil Code however contains nine articles on the general subject, which in Louisiana goes by the title of "Offences & Quasi Offences," the Articles being 2315 (already cited) to 2324 (inclusive), which articles I append to this answer, omitting 2315, already quoted, in order that the entire statutory law on the subject matter shall be placed before you. Of course, these articles have been the subject of judicial construction and interpretation for many years and the decisions are, from my point of view, "law or authority" under the Code, and you will so understand my answer.

219 The Articles above mentioned are as follows:

Article 2316. Negligence, Imprudence, or Want of Skill: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

Article 2317: Liability for acts of others and things in our charge: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

Article 2320: Acts of Servants, etc.: "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

In the above cases responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it."

Before the adoption of the amendment of 1884 these statutes were construed as limiting the survivor's action to the right of action which the deceased would have had, had he survived the injury Vredenburg vs. Behan, 33 La. An. 643.

After the passage of the Act of 1884 the Court declared that the Act created 'an obligation by expressly declaring the existence of a liability where there was none before, and opens the way to a recovery for its violation.' Van Amberg vs. R. R. Co. 37 La. An. 652. Eichorn vs. R. R. Co. 112 La. 250; 36 S. R. 335.

Therefore as the law stood at the date of this accident and as it now stands, the survivor may recover:

(1) The damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his-
220 loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness. These are call heritable damages.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

On both propositions see Eichorn vs. R. R. Co. 114 La. 718 et seq., 38 S. R. 526; Payne vs. Lumber Company 117 La. 991; 42 So. Rep. 475; Dobyns vs. R. R. 119 La. 82; 43 So. Rep. 934.

(3) To these elements the court has now added recovery for mental suffering of the survivor. See Stewart vs. R. R. 112 La. 767; 36 So. Rep. 676 as applied in Graham vs. Telegraph Company 109 La. 1070, 34 So. Rep. 91; Parker vs. Lumber Co. 115 La. 463, 39 So. Rep. 445, and note the qualification in Brinkman vs. Oil Co. 118 La. 846, 43 So. Rep. 458.

(4) Vindictive or punitory damages are not permitted in actions for personal injury against a corporation. McGary vs. City, 12 Rob. (La. Reports) 675. McFee vs. R. R. Co. 42 La. An. 790. Patterson vs. R. R. Co. 110 La. 797, 34 So. Rep. 782 and Parkerson case 115 La. 468.

(5) No action lies under the statute in favor of the surviving child who had reached the age of majority before the accident. Huberwald vs. R. R. Co. 50 La. An. 477. 23 So. Rep. 474. In Eichorn vs. New Orleans & Carrollton R. R. Co. 114 La. 712, 38 So. Rep. 529-531, you will find that the child's right of action was recognized, where the child being a minor at the date of the accident had reached majority since then. The age of majority in Louisiana is 21 years. Where the action runs in favor of minors the damages are apportioned according to their respective majorities. See Eichorn's case 114 La. at p. 726.

(6) Children under the code of Louisiana, Article 2229 'are bound to maintain their father and mother and other descendants who are in need,' on the other hand the child under Article 216 of
221 the Civil Code remains under the authority of his parents until his majority:

There is also further provision, Articles 230-231, defining alimony as 'what is necessary for the nourishment, lodging and support of the person who claims it.'

In Myhan vs. Electric Co. 41 La. An. 969, the parents claimed for the death of a son of eighteen years. The court referring to his duty said: 'The probability is that as he was a robust young man, attentive to his duties and kind to his parents, he would have advanced in life and bettered his and their condition. In the course of years he would have accumulated earnings to some reasonable extent, due regard had to his personal wants and necessities, etc.'

This would indicate that the child over majority owes certain obligations to his parents. I do not think these are the same he would owe or that they could expect from a minor. Therefore I consider under our law that question Six subsection (*b*) must be answered in the affirmative. In the Myhan case the court allowed $2000.00 for the death, as a sum that would relieve the parents 'for a while to some extent from the immediate consequences attending the severe injury inflicted on them.'

The Supreme Court of Louisiana has decided that the restrictive

clause of Article 2320 has been read out of the Article as the result of the jurisprudence of this State:

As to this it is said in Weaver vs. Goulden, 116 La. 473, 40 So. Rep. 798, as follows: 'As to corporations the restrictive clause of this article has been read out of the text both as to servants and third persons on the principle that a corporation is always present through its agents.' And further it is said: 'Even as between individuals this restriction has been virtually ignored in the latter decisions of this court.'

222 On the 1st of June 1905 and for many years prior thereto the statutory authority for an action for personal injuries by the servant against the master was the articles 2317 and 2320 of the Civil Code above quoted, which are to be read in connection with Article 2315, being all on the same subject matter.

In a trial before a jury under the practice in Louisiana, the jury is the judge of both fact and law. They are sole judges of the facts and are supposed to take the law from the court. The trial judges discuss in the charge the evidence only in a most general way, and they make no attempt to influence the jury by their opinion in reference to the evidence. They confine themselves as a rule to general references and to the general rules of law which would aid the jury in finding the truth. The result is that a trial before a jury up to the moment of the verdict, is more like a hearing before an Examiner in Chancery, than anything else I can think of

The jury in a civil cause is composed of twelve members, nine of whom may find a verdict.

The trial judge has the right to set aside the verdict of the jury, if he disagrees with its conclusions on the facts or on the amount of damages awarded. There is no limit to the judge's right to set aside the verdict, when he is not in accord with it on either ground See: State ex rel. Snider 47 La. An. 1482. In other words the trial judge may grant as many new trials as he sees fit. In the case just quoted, three successive verdicts in favor of the Plaintiff were set aside by the trial judge and an attempt was made to mandamus him in the Supreme Court, to compel him to sign one of those judgments, and it was held that the Supreme Court had no power to do so. On the other hand the trial judge may force a remittitur under pain of new trial if he considers the verdict excessive and there is no power to interfere with his conduct in this respect. Landry

223 vs. Ship Co. 112 La. 515, 36 So. Rep. 548.

The Supreme Court and other appellate courts of Louisiana examine the evidence in all cases, including those in actions for personal injury and decide upon the facts, as they find them, without reference to the verdicts of juries. In other words, the verdict of a jury, particularly in cases of that nature against corporations, has no sacramental weight and is not regarded as a final finding of facts. All the evidence is carried before the appellate courts for reexamination and review. Warner vs. Talbot, 112 La. 831, 36 So. Rep. 743—Schlater vs. Wilbut 41 La. An. 406—Wood vs. Jones 34 La. An. 1086.

I should hesitate to say that the word 'fault' used in the Louisiana Statute means substantially the same as negligence or carelessness in common law, for the reason that our court has displayed a disposition to release the defendant or condemn it where the fault was slight on either side, as the facts might be.

Substantially the word 'fault' as a rule means, under our law, such active or passive conduct as has brought about the injury in question.

I think the aim of our Louisiana Statute is to give pecuniary compensation for the loss sustained.

I have read the case of Cox 145 U. S. 593. I think that the Statute of Louisiana as printed in the margin at page 30, is a true copy of the original.

Concerning the remainder of the question, I do not think I am called upon to express an opinion, as I know nothing of the settled public policy of Texas. The Statutes as printed do not seem to me to be other than as suggested by the opinion. The Special Act of 1878 creating the Louisiana Western Railroad Company does not seem to have been one of the issues in that case.

224 The Statutory law of Louisiana and the interpretation thereof by the Supreme Court undoubtedly imposes upon all employers the duty to use ordinary care to furnish to employees a reasonably safe place in which to work, reasonably safe instrumentalities with which to work and reasonably safe employees with whom to work, considering the time, place, circumstances and conditions then and there existing, and the knowledge of the employee of the same, and a failure to do so would constitute 'fault' within the meaning of this statute and such fault would be negligence within the meaning of the law. Woods vs. Jones 34 La. An. 1086—Gusman vs. Caffery Co. 49 La. An. p. 1264; 22 So. Rep. 742; Henry vs. Lumber Co. 48 La. An. 950; 20 So. Rep. 221; Smith vs. Sellars, 40 La. An. 527; — So. Rep. —.

I refer you to the cases cited and also to Van Amberg vs. R. R Co. 37 La. An. 650—Wallis vs. Morgan's L. & T. R. R. Co. 38 La An. 156—Gusman vs. Caffery Co. 49 La. An. 1269-70; 22 So. Rep. 742—Jones vs. Ry. Co. 51 La. An. 1247—Merchant vs. Price Woods Co. 107 La. 563—Fuller vs. Tremont Co. 114 La. 267, 38 So. Rep 164—Harris vs. Lumber Co. 115 La. 977, 40 So. Rep. 374.

I think that the case of Roff vs. Summit Lumber Co. 44 So. Rep 302 correctly states the rule applied by the Supreme Court, and I refer you besides to the case of Bell vs. Lumber Company 107 La 731, 31 So. Rep. 994—Stucke's case 23 So. Rep. 342—Merritt's case 35 So. Rep. 499, Evans' case 35 So. Rep. 736 and Duncan vs. R. R. 51 La. An. 1783. These and the cases previously cited represent the trend of our jurisprudence on the subject matter."

In this connection the plaintiffs further offered and introduced in evidence, in connection with the answers of the said witness Dart introduced by them, the several decisions and statutes cited and referred to in said answers.

225 The plaintiffs further offered the following decisions and reports of adjudicated cases, to-wit:

Whitworth vs. Lumber Co., 46 So. Rep., 912.
Baylor vs. Company, 46 So. Rep., 703.
Day vs. Louisiana Western Railroad Co., — So. Rep., —.
Cox vs. Ry. Co. (U. S. Sup. Ct.) —.

It was here agreed in open court by and between the counsel of all parties, and with the consent of the presiding Judge that the various decisions and adjudicated cases and the reports thereof, as introduced in evidence by each of the parties and their counsel, need not be read or literally copied in the record but that the publications of such statutes and any printed and authentic copies thereof issued under the authority of the State of Louisiana, should be deemed and might be referred to as part of the record in the cause, and that any reports of said decisions and adjudicated cases as printed and published in the Court Reports of the State of Louisiana, or the Southern Reporter, or the Federal Reporter, should be deemed and regarded as part of the record, and that such reports should be so deemed sufficient for the purpose of reference in considering and deciding the questions involved in this cause.

In the District Court of Harris County, Texas, 11th Judicial District

No. 39491.

FELIX & THERESA GROSS
vs.
TEXAS & NEW ORLEANS RAILROAD COMPANY et al.

226 It is hereby agreed by and between the parties, plaintiffs and defendants, in the above entitled and numbered cause that the above and foregoing 108 pages of manuscript contain a true, full and correct statement of all facts proven upon the trial of said cause.

LOVEJOY & PARKER,
S. H. BRASHEAR,
*Attorneys for Plaintiffs.*
LANE, JACKSON, KELLEY & WOLTERS,
*Attorneys for Defendant Texas & New Orleans Railroad Company.*
LANE, JACKSON, KELLEY & WOLTERS,
*Attorneys for Defendant Louisiana Western Railroad Company.*

The parties, plaintiffs and defendants, in the cause No. 39491, entitled Felix & Theresa Gross vs. Texas & New Or-

leans Railroad Company et al., having agreed to the above and foregoing statement of facts, the said statement is hereby approved and ordered filed as a true, full and complete statement of the facts proven on the trial of said cause.

This the 18th day of Feb. 1909.

CHAS. E. ASHE,
*Judge 11th Judicial District Court,*
*Harris County, Texas.*

Endorsed: 4411. Filed February 18th, 1909, Henry Albrecht, Clerk District Court, Harris County, Texas, Frank H. Meyer, Deputy. Filed in Court of Civil Appeals, April 21, 1909. H. L. Garrett, Clerk.—Filed in the Court of Civil Appeals, at San Antonio, Texas, Feb. 25, 1910. Jos. Murray, Clerk.

227 *Copy of Orders of Court of Civil Appeals, at Galveston.*

Be it remembered: That at a term of the Honorable Court of Civil Appeals of the State of Texas, begun and holden at Galveston, on the 4 day of October, A. D. 1909, present R. A. Pleasants, Chief Justice, and Associate Justices T. S. Reese and S. A. McMeans;

In the cause

No. 5253.

T. & N. O. R. R. Co. et al., Appellant-,
vs.
FELIX & THERESA GROSS et al, Appellee-.

From Harris County.

the following Orders were made:

"FEB. 9, 1910.

In compliance with an order of the Supreme Court of Texas, dated Feb. 2, 1910, it is ordered that this cause be transferred to the Court of Civil Appeals for the Fourth Supreme Judicial District at San Antonio, and that the Clerk of this Court certify all orders made and costs accrued in this Court, and transmit all records and papers in this cause to the Clerk of said Fourth District."

I, H. L. Garrett, Clerk of the Court of Civil Appeals of Texas, at the City of Galveston, hereby certify that the foregoing is a true copy of the Orders made herein by this Court in the above entitled and numbered cause as appears of record.

In witness whereof, I hereunto set my hand and affix the seal of said Court at Galveston, this Feb. 9, 1910.

[SEAL.] H. L. GARRETT, *Clerk.*

Endorsed: 4411. T. & N. O. R. R. Co. et al. vs. Felix & Theresa Gross et al. Copy of Orders of Court of Civil Appeals at Galveston. H. L. Garrett, Clerk. Filed in the Court of Civil Appeals at San Antonio, Texas, Feb. 25, 1910. Jos. Murray, Clerk.

228 *Opinion.*

Court of Civil Appeals.

No. 4411.

T. & N. O. R. R. Co. et al., Appellants,
vs.
FELIX & THERESA GROSS, Appellees.

Appeal from Harris County.

The amended original petition on which the case was tried alleged in substance that Corley Gross, for whose death damages are sought, left no widow or children, that plaintiffs (appellees) are his parents, that said Corley Gross was in the employ of defendants, the T. & N. O. R. R. Co. and the Louisiana Western R. R. Co., as locomotive fireman, the former operating a line from Houston, Texas to Echo, Texas, and the latter a line from Echo to Lafayette, La.; that said companies operated their lines jointly, so that deceased was required to operate engines over both lines from Houston to Lafayette, was subject to be discharged by both companies; and said companies were practically partners in the conduct of said business; that the latter's road ran through a country where great numbers of cattle habitually grazed upon its right of way and track to the great menace of trains; that in the exercise of ordinary care it had fenced its right of way and deceased and other employees looked to defendants to use ordinary care in keeping such fences in proper repair to avoid collisions with cattle; that on the occasion of the injury, while deceased was prosecuting his duties, on a passenger train running from Houston to Lafayette and near the station of Sulphur in Louisiana, at night, the locomotive came in contact with a cow and was derailed, the result of which was Gross's death. The petition alleged negligence on the part of defendants in several particulars, which will not be stated here, but may be hereafter, if found to be necessary.

The original petition in this case was filed March 31, 1906, and the amended petition on May 19, 1908. In both the accident was alleged to have occurred on or about June 1, 1905.

In the original petition the allegations of damage to plaintiffs were two-fold. 1st. The pecuniary loss sustained by them
229 from the son's death, and 2nd. the damages which the deceased himself suffered, as surviving to plaintiffs, plaintiffs, in the latter connection, alleging in the original petition that under the Statutes of the States of Texas and Louisiana the cause of action which the deceased had against defendants for the injuries sustained by him, survived to his father and mother.

In the amended petition the latter claim for damages was abandoned, and this allegation appears: "Plaintiffs aver that by the statute law of the State of Louisiana they are given a right of action against defendants and each of them, for the damages sustained by

them by the death of their said son, caused by their negligence as aforesaid, which statute is similar to the statute of this State giving parents a right of action for the death of their son as a result of negligence."

At this point we may dispose of appellants' second assignment of error under which the contention is made that demurrers should have been sustained to the amended pleading upon this proposition: "An amendment of pleading which introduces a new or different cause of action, and makes a new and different demand not made before in the pending suit, does not relate back to the beginning of the action so as to stop the running of the statute of limitations, but is equivalent to a fresh suit upon a new cause of action, and the statute continues to run till the amendment is filed."

The demand for what is sued for in the amended petition appears also in the original petition, and therefore it is plain to our minds that the amended petition set up no new cause of action. Anything necessary to be alleged in order to perfect something that is insufficiently pleaded, is the office of an amendment. The cause of action was asserted from the first. In the original petition it seems there was the allegation of a statute of Louisiana, but only in reference to the right to recover, by survival, the damages suffered by the deceased. This allegation could properly be amended so as to
230 include in the Statute both forms of damage; and if the original petition had entirely omitted mention of the existence of any such statute, the allegation could be supplied by amendment. Consequently, the 1st and 14th assignments are overruled.

It is not deemed necessary to set forth the pleadings of the defendants, for such can be stated in the course of the opinion where necessary.

Under the 1st assignment of error, which arises under pleas of jurisdiction and abatement, we have this proposition:

"A suit or action instituted in the courts of Texas in a cause of action growing out of injury in the State of Louisiana; and when the laws of said State applicable thereto, either as to the right or remedy or defense, are essentially different from those of this State, the courts of Texas will not entertain jurisdiction of such suit or action."

The statute law of Louisiana on the subject was fully developed by the evidence; and its provisions in so far as they concern the right of parents to recover damage sustained by them from the loss of the son, which is all that is sued for in this action, are not essentially different from what is provided by our statute in such cases. No difficulty presents itself to our courts in administering the remedy substantially as contemplated by the statute giving the right; and no matter of public policy of this State intervenes to deter the Courts of this State from exercising jurisdiction. In the companion case to this, Texas & N. O. R. R. et al. vs. Fannie Miller et al., (both having been tried at the same time) the opinion by Associate Justice Neill deals more extensively with this question and gives our reason fully for overruling the assignment.

Under the 3rd assignment of error the third proposition is not well taken. It is true the proof of the Louisiana law developed that the statute of that State allowed compensation for loss of society and for mental anguish arising from the son's death, which are
231 elements not allowed by our statute. Because our statute did not go as far as the Louisiana statute, and the latter includes more elements of damage than ours, affords no reason why the right of recovery attaching under the foreign statute should not, or cannot, be administered fully in this State. The other point embraced by this assignment is that the testimony developed the fact that an Act of 1878 of the legislature of Louisiana incorporating the defendant the Louisiana Western R. R. Co. gave it immunity and exemption from liability for injuries resulting in death of its train operatives, and the amended statute of 1884 of that State creating actions in favor of certain relatives for such injuries, in so far as it might be intended to apply to the said defendant corporation, would impair the obligation of a contract, and violate the Constitution of the United States, of Louisiana and Texas, and hence evidence concerning such statutory right of action brought about by said amended statute was improperly admitted.

On this question, also, the opinion in the said companion case is full. We have arrived at the conclusion, for reasons there given, that the legislature was powerless to grant such immunity or exemption and that such provision of the legislative charter was of no effect, as against the exercise by the State of its governmental functions. As far as mere property rights are concerned there is no difference between the contract of a State and an individual, and a contract between two individuals. Jumbo Cattle Co. vs. Bacon 79 Tex. p. 13. But it is manifestly a different thing for a legislature to barter away, and thereby preclude future legislatures from legislating upon, subjects pertaining to government. If the state constitution provided for such an exemption as is presented here, which cannot be presumed, there might be ground for sustaining the proposition. The legislature doubtless had power to create a liability for damages for death arising from negligence of another. This power, if exercised in a constitutional manner, would be by law general in its character. A law making certain railway companies liable and not others, or exempting one and not others in such cases would clearly be void.
Consequently, if the special immunity granted to this de-
232 fendant be valid, a situation was created in the State in which no law general in its application, and therefore no valid law on the subject, could be enacted. It must be held, either that the immunity given this defendant was a surrender altogether of the power of the State to legislate on this subject, or that the Statute of 1884 included this defendant in its operation. It cannot, we think, be successfully claimed that the legislature may, by a contract with a person or corporation, include that which would necessarily consist in a surrender of its right to legislate on a subject of this character. The assignment is overruled, and likewise the 4th & 5th assignments. There is but one proposition under the 13th assignment and the above views require that it be overruled.

We pass to the 8th assignment which contends, 1st, that there is no pleading of negligence of defendants in leaving a dead animal near the track, whereby other animals were attracted into the right of way, thereby causing an obstruction and the derailment, and it was therefore error for the Court to base its judgment on a conclusion of fact to that effect. The finding was: "I find that some hours previous to the derailment that another of defendants' trains had struck an animal of the cow species near the place of derailment, and the carcass was allowed to lie upon the right of way within a short distance of a gate on the right of way fence, and that several hours prior to the derailment a number of cattle entered the right of way through said gate and were seen by employees of defendants in charge of one of defendants' east bound trains gathered about the dead one holding a 'ceremony,' as expressed by one of the witnesses, that the said cattle were probably attracted upon the right of way by the dead one, and I find that defendants knew, or ought to have known by the exercise of ordinary care, of the presence of the dead animal upon the right of way and knew, or would have known by the exercise of such care, that if the gate was open that cattle would probably be attracted therein by the dead one, or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified the
233 conductor and engineer of the train of that fact, and in time to have removed the cattle from the right of way, and I find that it was the duty of defendants and the section men upon the section upon which the cattle were, to have removed said cattle or failing to do so, to notify said conductor and engineer of the presence of said cattle upon the right of way and that they could have notified them etc., * * * and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right of way under the circumstances and in failing to remove them from the right of way before the accident, or in not giving the conductor and engineer notice of their presence upon the right of way and that such negligence was the proximate cause of the death of Gross."

The petition alleged negligence first: in allowing the animal which derailed the engine to be upon the right of way and track, by having the fence out of repair, or by allowing a gate to remain open an unusual length of time; second: in knowing of the presence of the cattle under the fences long enough to have had the cattle removed therefrom, or to have notified the conductor and engineer of their presence there; and third that a previous train had crippled or wounded the animal struck by the train in question, which animal was left in a wounded and disabled condition near the track, and that the animal scrambled upon the track where it remained until struck, and that said animal would probably work its way upon the track and become a dangerous obstruction to passing trains, was something that a person of ordinary prudence would have foreseen as likely to occur under the circumstances, and in the exercise of ordinary care should have been guarded against.

We think the findings of the Court sufficiently brought the case

within the second of the above forms of negligence pleaded. The gist of the negligence, as found by the Court, was knowledge of the presence of the animals within the fences long enough to have made it the duty of defendants in the exercise of ordinary care to have seen that they were removed, or to have notified passing trainmen, and the failure to do so.

234 The 2nd proposition under the 8th assignment is that the testimony did not identify the animal which derailed the train as being one of the animals theretofore observed at or about that place on the right of way. We overrule this as we think the conclusion was warranted.

We overrule the 9th assignment and hold that it did not appear undisputedly from the evidence that Gross assumed the risk.

We overrule the 10th & 11th assignments of error. They relate to certain rules that were introduced, the bill of exception showing that they were objected to because irrelevant and immaterial to any issue in the case as to either of the defendants.

The proposition under these assignments is that there being no evidence that these rules had been promulgated or established by the T. & N. O. Ry. Co., they were immaterial and irrelevant to any issue in the case so far as the T. & N. O. Ry. Co. was concerned. This was not the objection presented to the trial judge. We overrule the assignments.

We also overrule the 6th & 7th assignments of error, because we think the testimony warranted the Court in making the following findings of fact which are complained of: 1st. "That defendants were jointly engaged in the business of operating the said railways as one continuous line from Houston in Harris County, Texas to Lafayette in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock and employees of the other, as the business or convenience required and each hired for and discharged employees in the joint business, and the employees by one were required to perform and did perform services on the railway of the other; that such employees made continuous runs on trains operated from Houston to Lafayette and vice versa, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston and Lafayette over said railways as a continuous route and were partners in such business, sharing in the profits and losses thereof." 2nd. "That the railway of the

235 'Louisiana Company' ran through a country in which there were numbers of cattle and the said company fenced its right of way for the purpose of excluding cattle therefrom and that the fences were effectual to exclude cattle from the right of way when ordinary care was used to keep them in proper repair and when such care was used to keep the gates closed; and the employees operating trains over the said railway relied upon the company to keep the fence in repair and the gates closed to the end that they might not be exposed to the peril of injury or death by the derailment of engines and cars coming in contact with cattle which would otherwise enter upon the right of way and track."

From the first of the above findings of fact the overruling of the 12th assignment necessarily follows.

Under the 15th assignment of error is advanced this proposition: "A judgment by a Texas Court which awards damages in an unusually large sum for injuries in the State of Louisiana, resulting in the death of an adult son of the plaintiffs, based on measures of damage according to the laws of Louisiana, admitted in evidence over the defendants' objection, and including therein elements not recognized or allowed by the laws of Texas, should be set aside as excessive, unwarranted and void."

As hereinbefore mentioned the Louisiana statute, in addition to the pecuniary loss sustained, allowed for the deprivation of the decedent's society and solace, expenses of his death and burial and also for mental suffering of the survivors. The point made is that our courts cannot or should not allow for such elements of damage, as our legislature has seen fit not to provide for them in our statute. This right of action arose, not under our statutes, but under that of Louisiana which fixes both the right and the extent thereof. There exists no insuperable, or even inconvenient, difficulty, in arriving at the damages as allowed by the Louisiana statute, or in enforcing the judgment substantially in form and substance as would be done in that State. The right to recover damages existing, it
236 would seem to be wholly immaterial whether the cause of action arises at common law or by statutes, as to it being enforceable in the courts of another State, especially so when the law of the forum recognizes and gives a similar right of action for the same cause. We can see no sound reason for recognizing the foreign statute so far as it accords with what our statute allows in such cases, and refusing to give it any further enforcement on account of our statute which has nothing to do with the cause of action. The Courts of this State should in such cases, on principles of comity, hear and determine the right, as it exists, and enforce it in its entirety, or not at all.

The judgment is affirmed.

J. H. JAMES,
*Chief Justice.*

Opinion delivered and filed May 4", 1910.

Endorsed: No. 4411. In Court of Civil Appeals Fourth Supreme Judicial District of Texas, San Antonio. T. & N. O. R. R. Co. et al., Appellants, vs. Felix & Theresa Gross, Appellees. From Harris County. Opinion by J. H. James, Chief Justice. Filed in the Court of Civil Appeals, at San Antonio, Texas, May 4, 1910. Jos. Murray, Clerk.—Filed in Supreme Court, Jun- 23, 1910. F. T. Connerly, Clerk.

237 *Judgment of Court of Civil Appeals.*

WEDNESDAY, *May 4th, A. D.* 1910.

No. 4411.

T. & N. O. R. R. Co. et al., Appellants,
vs.
FELIX & THERESA GROSS, Appellees.

Appeal from District Court Harris County.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellees, Felix & Theresa Gross do have and recover of and from the appellants Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, and their surety The United States Fidelity & Guaranty Company, the amount adjudged by the court below, and all costs in this behalf incurred, and this decision be certified below for observance.

*Appellants' Motion for Rehearing.*

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio.

No. 4411.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Appellants,
vs.
FELIX & THERESA GROSS, Appellees.

To the Honorable Judges of said Court:

Now come the appellants, Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, in the above entitled and numbered cause, and file this their motion for rehearing, and pray that the court will arrest and set aside its decision and
238 opinion heretofore delivered and filed in this cause on May 4, 1910, and grant appellants a rehearing in said cause, for the following reasons, to-wit:

First.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the First Assignment of Error urged by appellants and presented on pages 7 and 8 of their brief on file, complaining that the Trial Court erred in overruling the pleas to the jurisdiction and in abatement of each of the defendants, as set forth

in Section II of the Original Answer of the Louisiana Western Railroad Company and Section 1 of the First Amended Original Answer of the Texas & New Orleans Railroad Company, respectively, and as shown and for the reasons stated in defendants' bill of exception No. 1 referred to and made part hereof.

And in this connection the Honorable Court of Civil Appeals erred (1) in holding that the right of action for injuries resulting in death in the State of Louisiana created by statute in that State was transitory and enforcible in the courts of Texas; (2) in holding that the conflict and inconsistency between the laws of Louisiana and Texas as to the measure of damage and extent of recovery awarded for injuries resulting in death was not such as to preclude the Texas courts from taking cognizance of the cause end enforcing the laws of Louisiana applicable thereto; (3) in holding that the conflict between the laws of Texas and of Louisiana on the doctrine of fellow servants, as a defense, was not such as to preclude the courts of Texas from taking cognizance of the cause and administering the laws of Louisiana applicable thereto; and (4) in holding that Section 17 of the Act of March 30, 1878 of the State of Louisiana, incorporating the Louisiana Western Railroad Company and granting immunity from liability such as is sought to be fixed on the defendant in this case, presents
no such defense as should preclude the Courts of Texas, on
239 the grounds of comity, from taking cognizance of this cause and administering the laws of Louisiana applicable thereto. And in this connection the Court by its action undertook to pass upon and construe said charter provision, and in holding against its validity refused to give full faith and credit to the act of another sovereign state, thus depriving appellants of privileges, rights and immunities to which they were entitled, under the Constitution and statutes of the United States of America.

Second.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Second Assignment of Error urged by appellants and presented on page 48 of their brief on file, and refusing to sustain the Fourteenth Assignment of Error urged by appellants and presented on page 168 of their brief, to the effect that the trial court erred to the prejudice of each of the defendants in overruling and refusing to sustain the special demurrers of said defendants and their special pleas of departure in pleading and the statute of limitation, to the effect that the plaintiffs' first amended original petition filed in this cause May 19, 1908, for the first time alleged "that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them (plaintiffs) by the death of their said son caused by their negligence as aforesaid, which statute is similar to the statute of this State giving parents a right of action for damages for the death of their son as the result of negligence;" that such allegation and the cause of action (if any) based thereon constituted a departure in the pleading from fact to fact and law to law, thus asserted for the first time, and the alleged injury having

occurred June 1st, 1905, said action was barred by the statute of limitation of the State of Texas of two years, and by the rule and law of prescription of one year of the State of Louisiana,
240 which were duly and specially plead by way of exception and plea by defendants, and each of them, in bar of said action, and the court should have so held, and accordingly should have entered judgment in favor of the defendants.

And in this connection the Court erred in that portion of its reasoning and conclusions which reads as follows:

"Anything necessary to be alleged in order to perfect something that is insufficiently pleaded, is the office of an amendment. The cause of action was asserted from the first. In the original petition it seems there was the allegation of a statute of Louisiana, but only in reference to the right to recover, by survival, the damages suffered by the deceased. This allegation could properly be amended so as to include in the Statute both forms of damage; and if the original petition had entirely omitted mention of the existence of any such statute, the allegation could be supplied by amendment."

The only reference to any statute of Louisiana and declaration thereon, embraced in the original petition, was as to the survival of the right of action accruing to the deceased himself, if he had not died, to certain of his designated relatives, which it was expressly held, in the case of T. & P. Ry. Co. v. Richards, 68 Texas, 378, could not be entertained or prosecuted in this State. The amended pleading of plaintiffs, on which trial was had, entirely eliminated this statutory right of action of Louisiana, which was mentioned in the first pleading, and for the first time declared on the statutory right of action in Louisiana, which was created by the amendment of 1884, giving right of action to the survivors for the damages sustained by them on account of the death, and this, we insist, involved a radical departure in pleading at least from law to law, and constituted the institution of a new suit on a different cause of action. (Ry. Co. v. Wyler, 158 U. S. 285; 39 L. Ed. 987;
241 Anderson v. Wetter, 69 Atl. 105; 15 L. R. A. (N. S.) 1003; Kansas City v. Hart, 60 Kansas, 684; 57 Pac. 938; Boston & Maine R. R. Co. v. Hurd, 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. Rep. 116.)

Third.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Third assignment of Error and the Fourth Assignment of Error, urged by appellants and presented on pages 74, 78 and 79 of their brief on file, complaining that the Trial Court erred in admitting the depositions of H. P. Dart, over the objection of the defendants, as set forth and for the reasons stated in defendants' Bill of Exception No. 6 and Bill of Exception No. 5, which are made part of the assignments, respectively, and for the following reasons specially: (1) that the evidence offered and introduced was not admissible under the pleadings of plaintiffs: (2) that Section 17 of the Act of 1878 of the State of Louisiana incorporating the Louisiana Western Railroad Company

was plead and proven without dispute, as a bar to the action, and the failure to recognize it as such on the part of the Texas Courts would involve a refusal to give full faith and credit to the act of a sovereign state, and the amended statute of 1884 of the State of Louisiana here offered and introduced in evidence over the objection of defendants, if applicable to the Louisiana Western Railroad Company, would impair the obligation of a contract theretofore entered into in reference to said immunity provision between the State of Louisiana and the Louisiana Western Railroad Company, and hence would violate the obligation of a contract, contrary to the United States Constitution and Statutes, and hence was not admissible; and (3) that the elements of damage allowed in Louisiana in a recovery by virtue of a statutory right of action in that State for injuries resulting in death, which were not allowable under
242 the laws of Texas in similar cases, could not afford a basis for recovery in the Texas courts in such case, and were therefore irrelevant and immaterial and should have been excluded upon objection.

And in this connection the conclusion of the Honorable Court of Civil Appeals, which reads as follows, in its opinion, is erroneous, to-wit: "It is true the proof of the Louisiana law developed that the statute of that State allowed compensation for loss of society and for mental anguish arising from the son's death, which are elements not allowed by our statute. Because our statute did not go as far as the Louisiana statute, and the latter includes more elements of damage than ours, affords no reason why the right of recovery attaching under the foreign statute should not, or cannot, be administered fully in this State."

Fourth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Fifth Assignment of Error urged by appellants and presented on pages 81 and 82 of their brief on file, complaining that the trial court erred to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas & New Orleans Railroad Company, in its judgment and decree against them, and in the conclusions of fact and law upon which said judgment is based, is this, that under and by virtue of Section 17 of the act of the legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, the said corporation was and is exempted from legal liability for the alleged injuries resulting in the death of Corley Gross and such immunity and exemption from liability was a matter of contract between the State of Louisiana and the said corporation, and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé; and the act of the legislature of the State of Louisiana of the year 1884, amending Article 2315 of the
243 Civil Code of said State so as to give, or attempt to give and create the right of action asserted by plaintiffs in this cause, would have, and did have, the effect, if enforcible, of impairing the obligation of such contract, and thus would be and was violative of the provisions of the Constitution of the State of Louisiana, and of

the State of Texas, and of the United States of America, and especially of Section 10 of Art. I of the Constitution of the United States of America.

And in this connection we insist that under the undisputed testimony and according to the authorities cited by the witness, H. P. Dart, on the subject of the Louisiana laws and decisions, Section 17 of the act of 1878, incorporating the Louisiana Western Railroad Company was valid under the Louisiana Constitution, existing at the time of its enactment, and remained and is so at this time, and the failure of the courts of Texas to so regard it and construe it, as a bar to this action, would be the failure to give full faith and credit to the act of a sovereign State, thereby depriving appellants of rights, privileges and immunities belonging to them under the Constitution and statutes of the United States; and moreover, the act of 1884, of the State of Louisiana, amending Article 2315 of the Civil Code, and for the first time undertaking to create a right of action upon which this suit is based, in so far as it might be applied to fix liability on the Louisiana Western Railroad Company in this case, would impair the obligation of a contract and thus violate the Federal and State Constitutions.

And in this connection we insist that the Honorable Court of Civil Appeals erred in holding that the amendment of 1884, creating such right of action for injuries resulting in death, was in the nature of a police regulation or a penal act, passed in accordance with the reserve police power of the State.

## Fifth.

That the Honorable Court of Civil Appeals erred in *in* its
244 opinion and decision by refusing to sustain the Sixth Assignment of Error urged by appellants and presented on pages 99 and 100 of their brief on file, complaining that the trial court erred to the prejudice of each of the defendants in its judgment and decree against them and in its conclusions of fact and law filed in connection with and in support of said decree, to the effect that the two defendants "were jointly engaged in the business of operating the said railways as one continuous line from Houston, in said Harris County, Texas, to Lafayette, in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock and employés of the other, as the business or convenience required, and each hired for and discharged employés in the said joint business, and the employés hired by one were required to perform, and did perform services on the railway of the other; that such employés made continuous runs on trains operated from Houston to Lafayette, and vice versa, and that both defendants were jointly engaged as common carriers of freight and passengers for hire between Houston and Lafayette over said railways, as a continuous route, and were partners in such business, sharing in the profits and losses thereof."

And the court erred in concluding, as matter of law, that the Texas & New Orleans Railroad Company was jointly liable with the Louisiana Western Railroad Company for the injury and death of

the said William Miller, and in rendering joint and several judgment against the two defendants accordingly.

Sixth.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Seventh Assignment of Error urged by appellants and presented on page 122 of their brief on file, complaining that the Trial Court erred in its judgment and decree and in that portion of its conclusions of fact and law, being
245 paragraph numbered 2, to the effect that the defendant companies owed a duty of using ordinary care to keep the gates closed, and that the employés operating the trains relied upon the said companies to keep the gates closed so as not to expose them to peril or danger of injury or death by derailment, and that the failure of defendants to keep such gates closed was negligence on their part, proximately causing the injury and death, and rendering judgment accordingly against defendants for the injury and death; for the reason that according to the facts of the case and according to the law applicable thereto, the said gates had been placed in the right-of-way fence for the use and benefit of third parties, and the Louisiana Western Railroad Company recognized the duty of said third parties to keep such gates closed and relied upon their doing so, a fact which was understood by the train operatives, and accordingly the failure of the defendant companies to keep said gates closed was not negligence on the part of defendants, or either of them, rendering them liable for the alleged negligence and death.

Seventh.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Eighth Assignment of Error urged by appellants and presented on page- 124 to 126 of appellants' brief, complaining that the trial court erred in rendering its judgment and in its conclusions of fact and law upon which said judgment was based and especially in that portion of its said conclusions of fact and law, being paragraph numbered 4, reading as follows, to-wit:

"I find that, some hours previous to the derailment of Gross' locomotive, that another of defendants' trains had struck and killed an animal of the cow species near the place of derailment; and the carcass was allowed to lie upon the right-of-way within a short distance of a gate in the right-of-way fence, and that several
246 hours prior to the derailment a number of cattle entered the right-of-way through the said gate, and were seen by employés of defendants in charge of one of defendants' east-bound trains gathered about the dead one holding a 'ceremony,' as expressed by one of the witnesses; that the said cattle were probably attracted upon the right-of-way by the dead one; and I find that defendants knew, or would have known by the exercise of ordinary care, of the presence of the dead animal upon the right-of-way, and knew or would have known by the exercise of such care that if the gate was open *and* that cattle would probably be attracted therein by

the dead one, or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified the conductor and engineer of the train of that fact, and in time to have had the said cattle removed from the right-of-way, and I find that it was the duty of defendants and the section men upon the section upon which the said cattle were to have removed said cattle, or failing so to do to notify said conductor and engineer of the presence of said cattle upon the right-of-way, and that they could have notified them, and in that case they and said Gross could have been upon the lookout for said cattle, and probably have avoided striking the one which they did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, or in not giving the conductor and engineer of the train notice of their presence upon the right of way, and that such negligence was the proximate cause of the death of Gross."

And in this connection we specially urge and insist that in order to sustain the judgment on the conclusion of fact found by the court in the 4th paragraph thereof, to the effect that the defendants
247 were guilty of negligence in failing to remove from the right of way enclosure the cattle which were observed by their employee Reese, inside of the fence, or to notify the deceased of the presence of said cattle upon the right-of-way and within such inclosure, it was necessary to show by some legal evidence the identity of the animal thereafter encountered by Miller's locomotive and causing the derailment, as one of the animals theretofore observed by Reese, and there being no evidence in this case tending to show such identity, there is no causal relation shown in the record between the negligence found by the court, in his conclusions, and the injury complained of, to support the judgment.

The record shows that the witness Reese (he being the only person who saw any animals on the track at this point on the date of the accident,) passed the point between the hours of 4:39 P. M. and 4:45 P. M. and saw one dead animal south of the track and four or five other animals inside of the right of way fence around this one, without giving any special description of these live cattle; that the train with which Miller and Gross were engineer and fireman reached the point of the accident, going in an opposite direction, at 11:45 P. M. on the same date, encountering one large animal, said to have been a big bull, causing the derailment, and at that time no other cattle were encountered or observed at this point. Between the time when Reese had observed the several animals at this point and the time when Miller's locomotive had encountered the one animal, there was a lapse of about seven hours. In the meantime the section foreman Bustin, at 6 P. M., Roadmaster Lawler, at 6:50 P. M., Engineer Hildebrand, at 8:15 P. M., and Engineer Kimmer at 11:07 P. M., had passed the point of the accident and observed no cattle on or near the track, or within the right-of-way at this point, and the evidence showed, without dispute, that people residing on either side

of the railroad in the vicinity of this point made a practice,
248 night and day, of passing through the right of way gates, frequently leaving them open on such occasions, so that cattle indiscriminately would have access to the right-of-way and road-bed and would enter upon it. Thus we insist in the light of the record and undisputed facts, that there is no legal evidence whatsoever to support the conclusion that the large animal encountered by the locomotive train by Miller and Gross at 11:45 P. M., causing derailment, was one of the several animals observed by the witness Reese, as he passed this point between 4:39 and 4:45 P. M., and hence the holding and conclusion of the court that the failure of the defendant companies to drive out the cattle observed by Reese, or notify Miller and Gross of their presence upon the right of way, was the proximate cause of the derailment, is not supported by any legal evidence in this case.

Eighth.

The Honorable Court of Civil Appeals erred in its opinion and decision by refusing to sustain the Ninth Assignment of Erorr urged by appellants and presented on pages 142 and 143 of their brief on file, complaining that the trial court erred to the prejudice of the defendants in rendering the judgment against them and in its conclusions of fact and law found as a basis of said judgment, in this, that according to the undisputed evidence the deceased was a man of considerable knowledge and experience as a locomotive fireman, being thoroughly familiar with the line of road over which he was operating the engine on this occasion, and being familiar with the method of fencing and maintaining gates along the right-of-way and inclosing the track, having had opportunity and experience prior to such accident in observing and encountering animals upon the track and within the inclosed right of way at such points as that at which this wreck occurred, and that, under the undisputed facts and according to the law applicable thereto, the deceased, Corley
249 Gross, had assumed the risk of the accident and injury, and neither of the defendants was liable therefor to the plaintiffs.

In this connection we specially refer to the statement of undisputed facts set forth on pages 143-151 of appellants' brief, which, according to our conception, bring the record of this case clearly within the decisions of our Texas Courts. (Quill v. Ry. Co. (T. C. A.) 46 S. W. 847; Quill v. Ry. Co. (Sup. Ct.) 93 Texas, 616; Ry. Co. v. Somers, 71 Texas, 702; Green v. Cross, 79 Texas, 131.)

Ninth.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Tenth Assignment of Error and the Eleventh Assignment of Error urged by appellants and presented on pages 154-156 of appellants' brief on file, complaining that the trial court erred to the prejudice of the defendant Texas & New Orleans Railroad Company, in admitting over its objections the printed rule No. 334 and printed rule No. 420, set forth in

defendants' bills of exception No. 2 and No. 3, for the reason that said rules were irrelevant and immaterial to any issue in the case, so far as the Texas & New Orleans Railroad Company was concerned.

This Honorable Court virtually concedes that the rules here introduced in evidence were not relevant or material as fixing liability on the defendant Texas & New Orleans Railroad Company, there being no evidence whatsoever showing that they were promulgated or authorized by this company, they being embraced in a book of rules purporting to have been issued by the defendant Louisiana Western Railroad Company, and some other companies in Louisiana, but the name of the Texas & New Orleans Railroad Company being in no way represented or mentioned upon or in
250 the book. However the Honorable Court disposes of these assignments by the suggestion that from the bills of exception it appears simply that the objection to the rules was that they were "irrelevant and immaterial to any issue in the case as to either of the defendants." We insist that in as much as the same counsel were representing each of the two defendants, this was an appropriate method of objection, and that the Texas & New Orleans Railroad Company is entitled to avail itself of this objection in its behalf without regard to the fact that the evidence offered was relevant and material as against its co-defendant, and that under the circumstances it became the duty of the court to restrict the evidence admitted and considered it only in relation to the liability of that company which was shown to have promulgated and become responsible for the rules and regulations introduced.

## Tenth.

That the Honorable Court of Civil Appeals erred in its opinion and decision by refusing to sustain the twelfth Assignment of Error urged by appellants and presented on pages 158 and 159 of their brief on file, complaining that the trial court erred to the prejudice of the defendant Texas & New Orleans Railroad Company in rendering judgment against it jointly with its co-defendant, for the reasons; (1) that at the time of the wreck and injury of the said Corley Gross he was not engaged in performance of any service on behalf of the said defendant, Texas & New Orleans Railroad Company, nor was then and there an employé of the said defendant; (2) those servants or employés of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs and made the basis of judgment herein, were not employés of the defendant Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the
251 principle of *respondeat superior;* (3) that the rules and regulations relied upon in the pleading and introduced in evidence, and which are alleged to have been negligently violated, thus causing the injury and death of Gross, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

## Eleventh.

That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Thirteenth Assignment of Error urged by Appellants and presented on pages 166 and 167 of their brief on file, complaining that the court erred to the prejudice of each of said defendants in its judgment and decree against them, and in its conclusions of fact and law, as found, upon which said judgment is based, for the reason that, according to the undisputed facts in this case, there were such dissimilarities between the laws of the State of Louisiana, in which the accident and injury occurred, and the laws of the State of Texas, in which this suit was prosecuted, as to render it impracticable and contrary to the policy of the law and the comity between the two States for the courts of Texas to take cognizance of and undertake to determine the controversies involved, and to administer and apply the laws of Louisiana, and that such dissimilarities and inconsistencies and conflicts between the laws consisted, according to the evidence, especially of the following features and particulars, to wit:

(1) That the laws of the State of Louisiana, in cases in which damages were allowed to parents for injuries resulting in the death of a child, and in which damages were allowed to the children and surviving wife for injuries resulting in the death of a husband, included and embraced in and as part thereof (*a*) the damages decedent might have recovered had he lived, such as compen-
252 sation for his pain and suffering, for his loss of wages or earnings during the time that intervened between the accident and his death, for his disfigurement, and for the expenses of his illness; (*b*) the loss or deprivation of the decedent's society and his aid and support, also the expenses of his death and burial; (*c*) damages for mental suffering of the survivors.

(2) That at the time of the occurrences of said injury and death, according to the laws of Louisiana applicable to the controversies involved in this cause, the engineer and fireman (Miller and Gross) were fellow-servants, so that the defendant companies were not liable under said law for the death of either of them, in so far as it was the result of negligence on the part of the other.

(3) That according to the provisions of Act No. 21 of the General Assembly of the State of Louisiana for the year 1878, which created the corporation of the Louisiana Western Railroad Company, the defendants were exempt from liability for the alleged injuries resulting in the death of Miller and Gross.

(4) That at the time of the alleged occurrence in the State of Louisiana, and according to the laws of Louisiana applicable to the issues and controversies in this case, the trial and appellate judges had greater power and control over the verdicts of juries than the judges of the courts of the State of Texas had or have, and, according to the laws of the State of Louisiana, nine members of the jury out of twelve had the power to render a verdict.

Wherefore defendants aver and submit that the pleas setting up such facts and conditions and dissimilarities of law in bar of the

action were supported by the evidence, and should have been sustained, and the court should have dismissed said cause or rendered judgment in favor of defendants.

## Twelfth.

253 That the Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the Fifteenth Assignment of Error urged by appellants and presented on page 177 of their brief on file, complaining that the Trial Court erred in rendering its judgment and decree therein, in the aggregate sum of six thousand dollars, and that said amount is exorbitant and excessive, and beyond the amount which the plaintiffs are legally entitled to under the evidence, and that such judgment is the result of the court applying the laws of Louisiana on the measure of damages, which laws in this respect were introduced in evidence over the objection of defendants, and that it was incompetent and against the policies of the courts of the State of Texas and against the spirit of comity between two several States for this court to allow damages herein according to measures of damage existing in the State of Louisiana, but which are not recognized or permitted according to the laws of the State of Texas in such cases.

And in this connection the error of the Honorable Court of Civil Appeals in refusing to sustain this assignment is manifest from the following quoted reasoning and conclusions set forth in its opinion, as follows:

"As hereinbefore mentioned the Louisiana statute in addition to the pecuniary loss sustained, allowed for the deprivation of the decedent's society and solace, expenses of his death and also for mental suffering of the survivors. The point made is that our courts cannot or should not allow for such elements of damage, as our legislature has seen fit not to provide for them in our statute. This right of action arose, not under our statute, but under that of Louisiana which fixes both the right and the extent thereof. There exists no insuperable or even inconvenient, difficulty, in arriving at the damages as allowed by the Louisiana statute, or in enforcing the judgment substantially in form and substance as would
254 be done in that State. The right to recover damages existing, it would seem to be wholly immaterial whether the cause of action arises at common law or by statutes, especially so when the law of the forum recognizes and gives a similar right of action for the same cause. We can see no sound reason for recognizing the foreign statute so far as it accords with what our statute allows in such cases, and refusing to give it any further enforcement on account of our statute which has nothing to do with the cause of action. The Courts of this State should in such cases, on principles of comity, hear and determine the right, as it exists, and enforce it in its entirety, or not at all."

We respectfully submit that the reasoning of this Honorable Court in the language above quoted is not in conformity, upon principle, with the decisions of this State in cases entertained by our Texas Courts on the basis of comity. But if it were true, as main-

tained by this Honorable Court, that principles of comity would permit our courts to award damages in this case for the deprivation of decedent's society and his aid and support and the expenses of his death and burial, as well as recovery for mental suffering of the survivors, none of which would be allowable under our Texas statute, yet the reasoning of the court would still not justify the allowance to the survivors of those damages which the decedent himself might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, and for the expenses of his illness, which he would have been entitled to under the Louisiana Act before the amendment of 1884, and which it has been expressly held by the Supreme Court of Texas they could not have recovered or maintained an action for in the courts of this state. (Ry. Co. v. Richards, 68 Texas, 378.)

255 Appellants further show that the attorneys of record for appellees herein are Messrs. John Lovejoy and John W. Parker and S. H. Brashear, who reside and have their postoffice addresses in the city of Houston, Harris County, Texas.

Wherefore appellants pray for the issuance and service of citation and notice upon this motion and that upon hearing hereof this motion be granted, awarding a re-hearing of the matters involved herein and that the said decision and opinion of this court heretofore entered be re-considered and set aside, and upon further hearing that the judgment of the trial court herein be reversed, and for such other relief as appellants may be entitled to.

Respectfully submitted,

BAKER, BOTTS, PARKER & GARWOOD AND
A. L. JACKSON, *Attorneys for Appellants.*

Endorsed: No. 4411. In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio.—Texas & New Orleans Railroad Company et al., Appellants, v. Felix & Theresa Gross, Appellees.—Appellants' Motion for Rehearing. Filed in the Court of Civil Appeals, at San Antonio, Texas, May 18, 1910. Jos. Murray, Clerk. Filed in Supreme Court June 23, 1910. F. T. Connerly, Clerk.

*Order Overruling Motion for Rehearing.*

WEDNESDAY, *May 25th, A. D.* 1910.

No. 4411.

T. & N. O. R. R. Co. et al., Appellants,
vs.
FELIX GROSS et al., Appellees.

Appeal from Harris.

The motion of appellants for a rehearing filed May 13th, 1910, coming on to be heard and the Court having duly consid-
256 ered the same it is ordered that said motion be, and it is hereby overruled; it is further ordered that appellant Texas & New Orleans Railroad Company, and Louisiana Western Railroad Company, and their surety, The United States Fidelity & Guaranty Company pay all costs of this motion.

257 *Petition for Writ of Error.*

In the Supreme Court of Texas.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs in Error,
versus
FELIX and THERESA GROSS, Defendants in Error.

Petition for Writ of Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio.

To the Honorable Supreme Court of the State of Texas:

Your petitioners, Texas & New Orleans Railroad Company and Louisiana Western Railroal Company, hereinafter styled plaintiffs in error, applying to this Honorable Court for Writ of error in cause No. 4411, styled Texas & New Orleans Railroad Company, et al., Appel-ants, v. Felix and Theresa Gross, Appellees, pending in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, would respectfully show that the Texas & New Orleans Railroad Company is a private corporation, created and existing under and by virtue of the laws of the State of Texas, with its principal office, place of business, and domicile located in the City of Houston, Harris County, Texas, and that the Louisiana Western Railroad Company is a private corporation, existing under and by virtue of the laws of the State of Louisiana, and having and maintaining its place of business, principal office and domicile in the State of Louisiana, and beyond the limits of the State of Texas; that the defendants in error, Felix Gross and Theresa Gross, and

their attorneys of record, John Lovejoy and John W. Parker, each and all reside and are to be found in the City of Houston, Harris County, Texas.

Petitioners further show that the Honorable Court of Civil Appeals has stated with substantial accuracy in its opinion the history and nature of this suit, but petitioners object to some of the inferences of fact and conclusions of law announced in the opin-
258 ion of said Court of Civil Appeals, which objections will be hereinafter specially set forth.

Petitioners further show that the defendants in error, as plaintiffs below, recovered judgment in the District Court of Harris County, Texas, January 30, 1909, against the plaintiffs in error, jointly and severally, for the aggregate sum of six thousand dollars, apportioned equally between them, and from said judgment the plaintiffs in error, as defendants below, appealed to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, and thereafter, under order of the Supreme Court of Texas, said cause was transferred for hearing and submission to the Honorable Court of Civil Appeals for the Fourth Supreme Judicial District, at San Antonio, and the latter court rendered and delivered its decision and opinion on the 4th day of May, 1910, in all things affirming the said judgment of the lower court; that afterwards on the 13th day of May, 1910, plaintiffs in error filed in said Court of Civil Appeals their motion for rehearing, and thereafter on the 25th day of May, 1910, said motion for rehearing was overruled and refused by the Court of Civil Appeals.

Petitioners further show, as grounds for this application, that the Honorable Court of Civil Appeals in and by virtue of its opinion, conclusions and decision has erred on points of law involved in this cause and duly presented in said motion for rehearing, and set forth in the following specific grounds of error, to wit:

First Ground of Error.

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the first assignment of error urged by appellants, and presented on pages 7 and 8 of their brief on file, and embraced in paragraph first and eleventh of the motion
259 for rehearing, complaining that the trial court erred in overruling the pleas to the jurisdiction and in abatement of each of the defendants, as set forth in Section II of the original answer of the Louisiana Western Railroad Company, and Section I of the first amended original answer of the Texas & New Orleans Railroad Company, respectively, and as shown and for the reasons stated in defendants' bill of exception No. 1, which is referred to and made a part thereof.

And in this connection the Honorable Court of Civil Appeals erred (1) in holding that the right of action for injuries resulting in death in the State of Louisiana, created by statute in that State, was transitory and enforcible in the courts of Texas; (2) in holding that the conflict and inconsistency between the laws of Louisiana and Texas as to the measure of damage and extent of recovery

awarded for injuries resulting in death was not such as precluded the Texas courts from taking cognizance of the cause and enforcing the laws of Louisiana applicable thereto; (3) in holding that the conflict between the laws of Texas and of Louisiana on the doctrine of fellow-servants, as a defense, was not such as to preclude the courts of Texas from taking cognizance of the cause, and administering the laws of Louisiana applicable thereto; and (4) in holding that Section 17 of the act of March 30, 1878 of the State of Louisiana, incorporating the Louisiana Western R. R. Company, and granting immunity from liability, such as is sought to be fixed on the defendant in this case, presents no such defense as should preclude the courts of Texas, on the ground of comity, from taking cognizance of this cause, and administering the laws of Louisiana applicable thereto. And, in this connection, the court by its action undertook to pass upon and construe said charter provision, and in holding against its validity, refused to give full faith and credit to the act of another sovereign State, thus depriving appellants of privileges, rights and immunities, to which they were entitled under the Constitution and statutes of the United States of America.

260 Statement.

The defendant Louisiana Western Railroad Company urged and submitted in due order a plea in abatement, and to the jurisdiction of the court, in the following language, to wit:

"Said defendant shows to the court that, as appears on the face of plaintiffs' petition herein, the cause of action, if any the plaintiffs have, arose from acts and injuries occurring, not within the limits of the State of Texas, but entirely within the limits and boundaries of the State of Louisiana; and that the plaintiffs will in no event be entitled to recover or to have their recoveries, if any, measured except and unless under and according to the laws of the State of Louisiana as they existed at the time of said alleged occurrences. And this defendant further shows and submits to the court that the laws of Louisiana applicable to the alleged facts and occurrences of which the plaintiffs complain, and under which they will have to recover, if at all, and according to which the defenses to said action would have to be made, and the measures of their recovery, if any, would have to be determined, are utterly different and dissimilar from the laws of Texas that would be applicable to any action accruing from a similar occurrence within the limits of the State of Texas; and that such inconsistency and dissimilarities between said laws of the two States of Louisiana and Texas are so pronounced and radical, that the courts of this State, in the exercise of substantial justice and in comity and in accordance with the statutes and the laws and public policies of this State, cannot legally or properly undertake to try this case and administer the laws of the State of Louisiana applicable thereto, and defendant avers that it is informed and believes, and upon such information and belief so charges, that said dissimilarities and inconsistencies, aside from many others, consist, and did at the time of the injuries

and since, consist of the following features and differences in particular, to wit:

261 "(*a*) That at the time the action alleged in plaintiffs' petition arose and accrued in the State of Louisiana, and the laws thereof became applicable thereto in regard to the right and form of action, the parties and the remedy and the measure of damages, the law- prevailing in the State of Texas on each of said subjects and matters were and now are distinctly and radically different from and inconsistent with the said laws of Louisiana; that said laws of Louisiana provided, authorized and entertained no joint action in favor of the surviving parents, and no distribution among them of the sum awarded by the verdict, according to the discretion of the jury, in a suit for the death of a child, as authorized by the laws of the State of Texas; that the laws of the State of Louisiana in cases in which damages were allowed to parents for injuries resulting in the death of a child included in and as part of such damages compensation for their wounded feelings and affections, caused by the death of the child, and for the deprivation of the pleasure and comfort of its society, while the laws of the State of Texas allowed in such actions no compensation for wounded feelings or affections, nor for the loss of the pleasure and comfort of the society of the deceased.

"(*b*) That at the time of the occurrence in the State of Louisiana complained of by plaintiffs in their petition herein, the laws of Louisiana, with reference to the doctrine of the negligence of fellow-servants as a matter of defense to the Louisiana Western Railway Company, were and have remained, and still are, totally at variance with the laws of the State of Texas at that time and at the present time, so that while the negligence of any of the deceased's fellow-servants contributing to his alleged injuries and death would have constituted, according to the laws of the State of Louisiana, when plead and proven, as this defendant proposes to do, if required to plead, an available defense, and would exempt defendant

262 from liability in this action; yet, according to the laws of the State of Texas, applicable to such injuries occurring within its limits, such defense as the negligence of a fellow-servant would not avail as a bar to recovery.

"(*c*) That the Louisiana Western Railway Company was, and is, a corporation created by special act of the legislature, known as Act No. 21 of the Acts of the General Assembly of the State of Louisiana for the year 1878, approved March 30, 1878, and said charter and special act declares and provides that the company shall not be responsible for the death or personal injury of any employé by any act of negligence on the part of the company, its officers or employés. The portion of said act referred to reads substantially as follows, to wit:

"That said company, its officers or employés, shall not be liable in any sum whatsoever, of damages or cost in any action brought by any party against it, or them, or any or either of them, for any injury to the person or loss of life or injury to, or detention or loss of baggage, caused by any accident, or alleged carelessness or negligence on the

part of said company, its officers or employés, and sustained by any person while riding or being transported free of charge, upon its rialroad or any part thereof, or upon any other railroad or transportation line occupied and operated by said company, or while the person whose death or personal injury shall have been caused by any such accident or alleged carelessness or negligence, shall have been at work or rendering any services as an employé of said company, or as an employé of any person or persons with whom said company may have contracted for such work or service, upon or in connection with its railroad, or any other railroad or transportation line occupied and operated by it. And all such free passengers shall travel, and all such employés shall labor and render service, upon said railroad, and upon all other railroads and transportation lines occupied and operated by said company, at their own risk as to
263 personal injury or loss of life or loss or detention of, or injury to baggage, resulting from accident, or alleged carelessness or negligence on the part of said company, its officers or employés, and the said company shall not be subject to any liability to any party for any such personal injury or loss of life."

"That by said act of legislature, the assumption of risk by the deceased Gross, as an employé, and exemption from responsibility on the part of the defendant Louisiana Western Railway Company for acts of alleged negligence of a fellow-servant, or any other servant or employé, was largely extended beyond what it was at common law, and that this became a matter of contract between the said defendant and the State of Louisiana, and a contract to which the deceased Gross, by virtue of his employment and service, became a party, and that the laws of the State of Louisiana under said charter and said contract would protect and exempt the defendant from liability by virtue thereof; but that the provisions of said charter and said special act of the legislature above set forth were not, when enacted, nor since, nor at the present time, in accordance with the laws or policies of the State of Texas, nor would or could the Courts of the State of Texas, in a spirit of comity or in line with the spirit of their laws or public policies, undertake to administer and apply said special act and charter so enacted and adopted by the State of Louisiana, as a special defense and immunity to the defendant in this case.

"(*d*) That at the time of the occurrences in the State of Louisiana complained of by plaintiffs in their petition herein, and since said date, and at the present time, the laws of the State of Louisiana and the laws and practices of the courts of the State of Texas were essentially different and conflicting in reference to the power and control of the trial and appellate judges over the findings and verdicts of juries, and with reference to the number of verdicts that might
264 be set aside and new trials granted, and with reference to the number of jurors required to concur in order to return a verdict; that while in the State of Louisiana, and according to its laws and rules of practice as the same have existed and now prevail, the concurrence of nine members of the petit jury is sufficient for the return of a verdict, and there is no limit to the power and discretion

of the judge to set aside such verdict when not in accord with his views, while under and according to the laws and rules of practice of the State of Texas the trial and appellate judge is not authorized to set aside a verdict unless he finds it against the preponderance of the evidence to such extent as to show manifest injustice, and the concurrence of the entire jury is essential to the finding and return of a verdict.

"Wherefore, the defendant Louisiana Western Railway Company prays that this court decline to take jurisdiction of this case, and that this defendant may be discharged with its costs." (Tr., pp. 10-15.)

The defendant Texas & New Orleans Railroad Company, in its answer, adopted and urged also the plea in abatement and to the jurisdiction of its co-defendant, as above quoted (Tr., p. 30); and these pleas were submitted together to the trial judge. (See bill of exception No. 1, Tr., pp. 41 et seq.)

The defendants, in support of these pleas, prior to the hearing on the merits, introduced the depositions of H. P. Dart, Esq., of the New Orleans Bar, who qualified and gave his testimony as an expert, and with such depositions, supplemented by statutory codes and various court decisions of the State of Louisiana, conclusive proof was made upon the following points in support of these pleas, to wit:

(1) The basis and history of the right of action in Louisiana for injuries resulting in death; (2) differences in the measure of
265 damages for injuries resulting in death between the laws of Louisiana and of Texas; (3) the defense of fellow-servant was available to defendants in this case under the laws of Louisiana, and under those laws Miller and Gross, the engineer and fireman, were fellow-servants, and there was no statute, as in Texas, qualifying the doctrine; (4) that the defendant Louisiana Western Railroad Company was incorporated by virtue of an act of the Louisiana legislature which became effective March 30, 1878, and this act contains a provision exempting the defendant from liability for injuries such as those inflicted upon Miller and Gross, and which are the basis of this suit; and at the time of said incorporating act it was not violative of any provision of the Louisiana Constitution, nor was there any right of action at that time for injuries resulting in death for which the recovery herein sued for could be had, such right of action (if any) having been created subsequently by amendment of the statute in 1884; (5) that the power and discretion exercised by the trial and appellate judges over verdicts of juries is more extensive and absolute according to the practice of the State of Louisiana than in Texas; (6) that the source of the law of master and servant in the State of Louisiana is the statutes of that State, and these have their basis and origin in the civil law. (See Bill of Exception No. 1, Tr., pp. 49-78.)

The testimony of the witness Dart, together with the legislative acts of Louisiana and decisions on the points above mentioned, is set forth literally on page 12 to 26 of appellant's brief, filed in the Court of Civil Appeals.

Authorities.

Willis v. R'y Co., 61 Texas, 432.
R'y Co. v. Richards, 68 Texas, 375.
R'y Co. v. McCormick, 71 Texas, 630.
De Harn v. R'y Co. (Tex. Civ. App.) 22 S. W., 249.
266 De Harn v. R'y Co. (Sup. Ct.), 86 Texas, 71.
R'y Co. v. Jackson, 89 Texas, 107.
Slater v. Mexican National R'y Co., 194 U. S., 48 L. Ed., 900

Argument.

Where the laws of two States relating to the cause of action and the defenses applicable to the facts are in radical conflict, and action was instituted in the court of the State in which the facts giving rise to the cause of action did not occur, jurisdiction of such cause should not be entertained. This doctrine is thoroughly settled in the jurisprudence of our State, and is announced and applied to various sets and conditions of fact in the Texas decisions above cited. In cases of tort, the laws of the State or county in which the tort was committed are applicable, and if in such case action be brought in another State, the courts of the latter will take cognizance of the right of action, and administer the laws of the locality in which the right of action arose—provided the laws of the forum, on a similar state of facts occurring within its limits, are substantially the same as those prevailing in the foreign State or country. The basis of this principle and practice is the spirit of comity obtaining between the two States or countries, and its recognition and application in any given case necessarily presupposes the co-existence of substantially identical laws applicable to the subject of controversy in the two States, for otherwise the trial and adjudication of the controversy would tend to infringe and ignore, instead of promoting, the principle of comity. The doctrine, as we conceive it, applies not only to those conflicts which are inherent in the right of action itself, but as well to the remedies, measures of damage, the defenses, and other vital features of the action; and this view, we think, is amply illustrated and sustained by the decisions of
267 our own courts above cited, which we will here briefly review.

In the case of Willis v. R'y Co. 61 Texas, 432, the Supreme Court of Texas declined to entertain jurisdiction of an action by the surviving wife for damages on account of the negligent killing of her husband in the Indian Territory, it being alleged in the petition that there was no right of action in the Indian Territory accruing to the wife for injuries there resulting in the death of her husband.

In its opinion, our Supreme Court, speaking through Chief Justice Willie, used the following language:

"The rules governing suits arising out of torts committed in a locality other than the government where the redress is sought are about these, as deduced from the authorities upon the subject: Where the action is transitory and is based on personal injuries recognized as such by universal law, the suit may be brought

wherever the aggressor is found, irrespective of the provisions of the local law, or whether there be any law at all in force at the place where the wrong was committed. Rorer on Interstate Law pp. 154, 155.

"But where the right of action does not exist except by reason of statute, it can be enforced only in the State where the statute is in existence, and where the injury has occurred. That is to say, the cause of action must have arisen, and the remedy must be pursued in the same State, and that must be the State where the law was enacted and has effect.

"The principle upon which the doctrine rests is the want of power in a State to give her laws an extra-territorial effect. Our State, in providing that the negligent killing of an individual shall constitute a cause of action in certain of his survivors for damages against the party committing the homicide, is providing only for cases occurring within her own borders. She makes that an actionable tort, 268 which was not so before by common law. Within her own jurisdiction the law is changed by reason of this statute, but it remains the same everywhere else; and the death of the husband through negligence of a railroad company, if the injury occurred in the Indian Territory, was no more a cause of action after the passage of our statute than it was before.

The government exercising authority in the locality where this act was committed is the only one to determine and provide whether or not such an act shall be a good ground for suit in behalf of anyone, and to name the parties in whom the cause of action shall exist. It is not the mere giving of a remedy for a right previously possessed, but it is the creation of a right itself in certain parties which before belonged to no one whatever. Hence, it is held in all States having statutes like our own, that the parties named in the domestic statute cannot sue in the State where it was enacted for damages caused by a negligent killing which has occurred in another." (61 Texas, 434.)

In the case of T. & P. R'y Co. v. Richards, 68 Texas, 375, suit was brought in a Texas court by a minor child to recover such damages as the father might have recovered, had he survived his injuries. The injuries occurred in the State of Louisiana, where such an action was authorized by statute. At that time, the amendment of 1884 of the Louisiana Civil Code, creating a right of action immediately to certain relatives for the damages done to them by the injury and death, had not been enacted. The Supreme Court of Texas declined to entertain jurisdiction, because at common law no such right of action existed, and there being no similar statute in this State, the rule of comity did not apply. Justice Stayton, of our Supreme Court, in giving the opinion, says:

"We know of no rule of law which would authorize a court of this State to give effect to the laws of another State conferring such right as is claimed in this case, when the laws of this State de- 269 clare that the same facts, transpiring here, as are made the basis of the appellee's claim, could confer no right whatever to the relief sought. The most liberal State comity cannot, in refer-

ence to such a matter as that before us, require one State to enforce the laws of another, when in conflict with its own." (68 Texas, 378.)

In the case of Railway Company v. McCormick, 71 Texas, 660, it is held that the courts of Texas must decline jurisdiction of an action by a widow founded upon the negligent killing of her husband in Arkansas, because the laws of that State are so dissimilar to those of Texas that the courts of this State will not attempt to enforce them. Our Supreme Court, in its opinion, recites and reviews at some length the statutes of Arkansas, creating the right of action for injuries resulting in death, and calls attention to the difference between that statute and the statute of Texas on this subject, and especially with reference to the procedure and relief provided for in the Arkansas statute; and in that connection the court used the following language:

"A difference in the statutes, in the beneficiaries, and in the procedure, would become more evident, should the widow, the child or children, the parents or parent surviving, the husband, etc., whose death had been caused in Texas under circumstances giving damages, seek to join in a suit to maintain their rights in an Arkansas court. Nor is it likely that the Texas law for the distribution of the recovery could have any effect. The distribution would not be left to the jury, when the statutes directed its descent as other personal assets.

"We see no other combination of facts giving the right to sue in both, except where the sole heir is one of those named in the statute of Texas who may sue in the absence of an administration.

270 "But it does not appear that the remedies should be reciprocal. Statutes are enacted in the several States for the local public good, and as of themselves they have no extraterritorial effect, it is not likely that the effect to be given them by neighboring States has any influence inducing their enactment. They are not made to be enforced even in comity outside of the State. 'Comity extends only to enforce obligations, contracts and rights under provisions of law of other countries, which are analogous or similar to those of the State where the litigation arises.' (Rorer on Interstate Law, 5.)

"When the courts are asked to enforce a right given under a local statute, and it is made to appear that the act complained of was committed out of the State, and it is shown that the laws of that State are similar to the local statutes giving the remedy, the duty of taking jurisdiction would be indicated, if the local courts will recognize the action as transitory.

"A majority of the members of the court, however, are averse to assuming duty of enforcing the more complicated statutes of Arkansas upon the subject-matter of this litigation.

"While not receding from the utterances of C. J. Willie in the Willis case, 61 Texas, 432, nor formally adopting it—leaving the main question open as in the Richards case, 68 Texas, 375,—it is here held that the cause of action exhibited in the record, arising under and to be determined by the laws of Arkansas, which are

so dissimilar in many respects from the Texas statutes, cannot be here enforced." (667 and 668.)

In the case of De Harn v. Mexican National Railway Company (Texas Civil Appeals) 22 S. W., 249, suit was brought in a Texas court against the Mexican National Railway Company by plaintiff for injury to her son, resulting in death, occurring in the Republic of Mexico. The petition alleged that the deceased was in
271 the employment of the defendant railway company, and while so employed received his injuries in the Republic of Mexico, which were due to the negligence of the railroad company, and as a result of his injuries, he soon after died in the City of Laredo, Texas; that the plaintiff was dependent upon the deceased for support, and during his lifetime he had contributed to her from the proceeds and wages of his employment. There was no allegation in the petition with reference to the laws of Mexico on the subject of this litigation. In the District Court demurrers were interposed to the plaintiff's petition by defendant, in the following language:

"Now comes the defendant, by counsel, and says that the allegations in plaintiff's petition are wholly insufficient at law to require any answer of this defendant, and of this defendant prays the judgment of the court.

"And especially excepting to plaintiff's petition, defendant says that it affirmatively appears thereby that her claim for damages is for injuries done to her son, Lewis De Harn, while in the employ of defendant, a foreign corporation, and in a foreign country, viz., the Republic of Mexico, and that said injuries resulted in the death of said Lewis De Harn. Wherefore, defendant says that the allegations of said petition do not show plaintiff entitled to the relief demanded, or to any relief whatever in this behalf, and of this defendant prays," etc.

The trial court sustained the demurrers, and appeal was taken to the Court of Civil Appeals. The Court of Civil Appeals at Galveston, through Justice Pleasants, affirmed the judgment of the lower court, citing and relying upon the former decisions of the Supreme Court in the case of Willis v. R'y Co., R'y Co. v. Richards, and R'y Co. v. McCormick, above referred to. (22 S. W. Rep., 249 and 250.)

272 Upon writ of error to the Supreme Court of Texas, the latter court affirmed the judgments of the District Court and the Court of Civil Appeals, and through Justice Gaines used the following language in its opinion:

"It is settled law that the statute of a State which for a tort gives a right of action in derogation of the common law, or a right of action unknown to that law, can have no extra-territorial force; and, in accordance with this rule, it has been expressly decided in this State that, for an injury inflicted in another State or Territory, which results in the death of the party injured, the surviving relatives have no right to recover in this State. Willis v. Railway, 61 Texas, 432; Railway v. Richards, 68 Texas, 375; Railway v. McCormick, 71 Texas, 660. But in each of the cases cited, the death occurred with-

out the limits of the State. A seeming exception is, that if the law of the State where the injury is inflicted gives substantially the same right of action which is given by the law of the State where the suit is brought, and in favor of the same parties, by reason of the principle of comity, the right will be enforced in the latter State. The doctrine is recognized in the case last cited, though it was then held that the facts of that case did not bring it within the principle. That decision, however, leaves the question open.

"We use the phrase, 'a seeming exception,' because it cannot in fact be deemed an exception to the general rule. That rule is founded upon the principle that the statutes of a State have no effect beyond its own limits, and that if the act or omission complained of be not actionable by the law of the State where it is committed, no action can properly be brought on it in another State, although, by the laws of the latter, the act would have been actionable if committed within its jurisdiction. * * *

273 "In order to illustrate this, let us take the case of a servant of a railway company who is injured by reason of the negligence of another employé of the same company. By statute in some of the States of our Union such corporations are held responsible for injuries which result from the negligence. Let us suppose that in a State where the common law as to such liability is still in force, one employé of a railway company is injured by the negligence of his co-employé, and that the person injured is carried into a State where the statute has established a different rule, and there dies; would it be proper for the courts of the State where the death occurred to hold the company liable for the consequences of the negligence of its servants, when, according to the laws of the State where the negligence occurred, no action would lie for such negligence?

"The act committed or omitted, in any case of this character, is the primary ground of the action. Although the death of the injured person is a necessary condition to a recovery on part of the beneficiaries pointed out by the statute, at the same time, in order to enable them to maintain an action, it is quite as essential that such act or omission should be contrary to the law of the place where the injury is inflicted. It should be not only misconduct, recognized by the law of the place where it occurs as unlawful to the person injured, but it should be such as is recognized by that law as legally injurious to those who seek to recover damages for the injury.

"As to torts, at least, the laws of a State have no operation beyond its own limits. When, for example, the courts of one State sustain a recovery for an injury to person or property inflicted in another State, it is because the wrongful act is legally injurious in the State where committed, and not simply because it would have been actionable if committed within the territorial limits of the jurisdiction of the forum. The case of Dennick v. Railway, 103 U. S., 11, is not in conflict with this doctrine. There the injury was inflicted in New Jersey, and was action-

able by the statutes of that State. The suit was brought in a
274 court in New York, and was removed to the United States Court. The statutes of New York upon the subject were similar to those of New Jersey, and the court held that the action could be maintained in the courts of New York."

In the case of Mexican National Railway Company v. Jackson, 89 Texas, 107, a citizen of Texas sued the Mexican National Railway Company for personal injuries inflicted on him in Mexico while in the service of the defendant, and which did not result in death. The District Court assumed jurisdiction and rendered judgment upon verdict, which was affirmed by the Court of Civil Appeals. Upon writ of error, the Supreme Court of Texas reversed and dismissed the cause, holding that while an action of such a character is transitory, and may be maintained at any place where defendant may be found, yet the courts of this State cannot undertake to adjudicate rights originating in another State or country under laws materially different from those of Texas in relation to the same subject, thus approving the McCormick, De Harn and other cases cited supra.

After showing at length the difference between the Mexican and Texas laws, the court, in its opinion, says:

"The Mexican National Railway is an important public highway in the Republic of Mexico, by which the commerce of that country is largely carried on with our people. Every judgment for damages rendered against it reduces its revenues, which must of necessity be restored through its charges for transportation of persons and property, and in the main must be paid by that people. It is but just, and perhaps necessary to a proper maintenance of that means of transportation, that the country in which it is operated should determine the charges to be enforced against it. If Texas should open her courts to all persons that may be injured in Mexico, in the management of that railroad and others, it
may seriously affect the means of commerce between this
275 State and that Republic. Thus it becomes a matter of public concern and a proper subject for consideration in this connection, in view of the fact that the railway company is still subject to that jurisdiction. Justice does not demand the exercise of jurisdiction, and comity between the governments in this State and Mexico would seem to forbid that they should do so."

In the case of Mexican Continental Railway Company v. Mitten (13 Texas Civil Appeals, 36 S. W., 282), Judge Fly comments upon the former opinion of the Supreme Court reversing the judgment in the Jackson case, and affirms the judgment rendered in the Mitten case by the District Court of El Paso, and the Supreme Court subsequently refused writ of error in the Mitten case. However, there is not the slightest reason for supposing that the Supreme Court of Texas, by this refusal of writ of error in the Mitten case, meant to qualify, much less to overrule, its former decision in the Jackson case.

In the case of Railway Company v. Jackson, Justice Brown, stating the case distinctly recites "that the defendant below, by special plea, set up and pleaded the laws of Mexico in such cases, al-

leging that the contract of service was entered into in that Republi
and the injury occurred within the Republic of Mexico; that it w
entitled to an adjudication under those laws which are so di
similar to the laws of Texas that the courts of this State ought n
to undertake to adjudicate them," etc.; and that this plea was su
ported by convincing proof of such dissimilarities. (89 Texas, 107

In the Mitten case, on the other hand, there was no allegatio
whatever in the petition, with reference to any laws of Mexico, bea
ing on the injury, and the Court of Civil Appeals speciall
276 emphasizes that "these questions were not raised in the low
court, but for the first time in this court," and the Court
Civil Appeals further says. "So far as the point (in the Jackso
case) rests on the dissimilarities of the laws, it does not necessaril
become a matter of discussion in this case where the laws of Mexi
were not proved." (36 S. W., 284.)

Thus it is manifest that in the Mitten case, there being no plea
ing or proof as to the laws of Mexico, the court recognized and a
plied the common law right of action on the assumption that suc
right of action existed likewise in Mexico under the principles of th
"universal law"; and this difference in the status of the records b
tween the Jackson and the Mitten cases doubtless accounts for th
refusal of writ of error by the Supreme Court in the latter case.

In Texas & Pacific Railway Company v. Cox, 145 U. S., 36 L. Ed
832, there was an action brought in Texas against a Louisiana co
poration for injuries inflicted in Louisiana resulting in death
Chief Justice Fuller, rendering the opinion of the Supreme Cou
of the United States, having compared the statutes of Louisiana an
Texas, declared that they were substantially identical, and that th
action being in its nature transitory, might be maintained in th
jurisdiction of Texas. He says:

"The action, being in its nature transitory, might be main
tained if the act complained of constituted a tort at common law
but as a statutory delict, it is contended that it must be justifiabl
not only where the act was done, but where redress is sought. If
tort at common law where suit was brought, it would be presume
that the common law prevailed where the occurrence complained o
transpired, but if the cause of action was created by statute, then th
law of the forum and of the wrong must substantially concur in orde
to render legal redress demandable.

"The statutes of these two States on this subject are not essen
tially dissimilar, and it cannot be successfully asserted tha
277 the maintenance of jurisdiction is opposed to a settled public
policy of the State of Texas."

The court then proceeds to discuss the decisions of the Texas court
in the cases above cited.

Counsel for appellees will cite and rely on the decision in the
Cox case as authority against our contention in the instant case, but
we call attention to the fact that in the record of the Cox case
here was no showing by pleading or evidence, with reference to the
several features of radical difference made manifest by the pleading
and proof in the instant case. The differences in regard to the pro-

cedure, the elements of damages, and the defenses, were not involved or referred to, as far as the record or the opinion in the Cox case discloses; nor was the special act of 1878 incorporating the Louisiana Western R. R. Co. before the court for consideration in that case. (See testimony of Dart, bill of exceptions No. 1, Tr., pp. 66 and 67.)

In the case of Slater v. Mexican National Railway Company, 194 U. S., 48 L. Ed., 900, it is held that a Federal court is without jurisdiction on account of the dissimilarity of the laws of Mexico and Texas with regard to the remedies and measure of relief allowed for injuries resulting in death (citing in this connection the Texas cases above cited, and apparently restricting or limiting the decision of the Cox case above mentioned). Chief Justice Fuller, Justice Harlan and Justice Peckham dissent, citing, among other cases, that of Mexican Central v. Mitten, and commenting on the fact that the Supreme Court of Texas refused writ of error in the latter case, the probable reason for which we have heretofore mentioned.

In the Slater case Justice Holmes, delivering the opinion of the court, says:

278 "As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. Stewart v. Baltimore & O. R. Co., 168 U. S., 445, 42 L. Ed., 537, 18 Sup. Ct. Rep., 105. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside of its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligato, which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout v. Wood, 1 Blackl., 71; Dennick v. Central R. Co., 103 U. S. 11, 18; 26 L. Ed., 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation (Smith v. Condry, 1 How., 28, L. Ed., 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

After discussing at length the inconsistencies between the remedies afforded under the Mexican and under the Texas laws, the learned Justice continues:

"Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas State courts. Mexican Nat. R. Co. v. Jackson, 89 Tex., 107, 31 L. R. A., 276, 33 S. W., 857; St. Louis, I. M. & S. R. Co. v. McCormick, 71 Tex., 660, 1 L. R. A., 804,
279 9 S. W., 540. The case is not one demanding extreme measures, like those where a tort is committed in an

uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them, notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case. See Mulhall v. Fallon, 176 Mass., 266, 54 L. R. A., 934, 57 N. E., 386."

Chief Justice Fuller, in his dissenting opinion, again takes issue with the holding of our Texas court in the case of Mexican Railway Company v. Jackson, 89 Tex., 107, and says:

"The question is one of general law, and we are not bound by that ruling."

And in this connection the learned Chief Justice cites the opinion of the Court of Civil Appeals in the case of Mexican Central Railroad Company v. Mitten, 13 Tex. Civ. App., 36 S. W., 282, and emphasizes the fact that writ of error was refused by the Texas Supreme Court in this latter case—the reason for which refusal we have heretofore suggested as being that, in the Mitten case, there was no pleading or evidence in the record showing the local laws upon the subject in the jurisdiction of Mexico, and the presumption was indulged that the right of action existed there in accordance with the "universal law."

Now, in view of the principles announced and applied in the above quoted decisions, let us analyze and compare the status of the laws in the two States of Texas and Louisiana bearing on the several features involved in this action.

First.

280 There is a vital conflict and inconsistency between the laws of the two States as to the measure of damages and extent of recovery awarded for injuries resulting in death.

In this connection we refer to the testimony of Mr. H. P. Dart and the Louisiana decisions cited by him, who gives the following summary of the damages allowed in such cases, according to the statutory laws and decisions of the State of Louisiana:

"(1) The damages the decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness. These are called heritable damages.

"(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

"On both propositions see Eichorn v. R. R. Co., 114 La., 718 et seq., 38 S. R., 526; Payne v. Lumber Company, 117 La., 991; 42 So. Rep., 475; Dobyns v. R. R., 119 La., 82; 43 So. Rep., 934.

"(3) To these elements the court has now added recovery for mental suffering of the survivor. See Stewart v. R. R. 112 La., 767; 36 So. Rep., 676, as applied in Graham v. Telegraph Company, 109 La., 1070, 34 So. Rep., 91; Parker v. Lumber Co., 115 La., 463, 39 So. Rep., 445.

"(4) Vindictive or punitory damages are not permitted in actions

for personal injury against a corporation. McGary v. City, 12 Reb. (La. Reports), 675. McFee v. R. R. Co., 42 Le. An. 790. Patterson v. R. R. Co., 110 La., 797, 34 So. Rep., 782."

In addition to these elements the witness Dart states other rules and proceedings on the subject of the minority and majority rights of children, and the alimony of the widow, which indicate variances between the law on measure of damages and procedure ob-
281 taining in the States of Louisiana and Texas, which in large measure at least would involve a source of difficulty to the Texas courts in their practical application.

We submit that the holdings and expressions of the courts in the case of Railway Company v. McCormick, 71 Texas, 660, and the Supreme Court of the United States in the case of Slater v. Mexican National Railway Company, 194 U. S., 48 L. Ed., 900, are directly applicable to the status of the present case, in respect to these conflicts and inconsistencies in measure and extent of damages and right to recover, according to the laws of the respective jurisdictions.

In the Slater case it is said:

"But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation (Smith v. Condry, 1 How., 28, 11 L. Ed., 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

The learned judge who tried the instant case without a jury evidently followed the view above quoted, bearing on the extent of the right under the *lex loci;* for he, upon the trial of the merits, admitted, over the objection of defendants' counsel, the evidence of the law of Louisiana as to measure of damages and extent of recovery, showing these elements and measures to go beyond the measures allowable under the laws of Texas. (See bill of exception No. 6, Tr. pp. 89-92.) And presumably these matters entered into the trial judge's consideration as a basis of his estimate and judgment in fixing the amount of recovery in this cause in the aggregate sum of six thousand dollars; and yet there is no law of Texas in
282 such case which, by analogy, would justify or support, through comity or otherwise, such an element of recovery as "damages which the decedent might have recovered had he lived, such as compensation for his pain and suffering," etc., or the loss to plaintiffs by "deprivation of the decedent's society and his aid and support, also the expense of his death and burial," or "mental suffering" of the surviving parents.

The language of Justice Stayton in the case of T. & P. R'y Co. v. Richards, 68 Texas, 375, we submit, is peculiarly applicable in this connection. He says:

"We know of no rule of law which would authorize a court of this State to give effect to the laws of another State conferring such right as is claimed in this case, when the laws of this State declare that the same facts, transpiring here, as are made the basis of appellee's

claim, could confer no right whatever to the relief sought. The most liberal State comity cannot, in reference to such a matter as that before us, require one State to enforce the laws of another when in conflict with its own law."

## Second.

There is a radical conflict between the laws of the two States on the doctrine of fellow-servants as a defense, the common law on this subject being qualified in the State of Louisiana by the decision of its courts, and there being in the latter State no statutory limitation on the defense as made by the statute of Texas.

Jones vs. S. P. Co., 114 Fed. Rep., 973.
Hale v. K. C. S. R'y Co., 120 Fed. Rep., 735; 57 C. C. A., 149.
Satterley v. Morgan, 35 La., 166.
Towns v. Company, 37 La., 632.
Bell v. Globe Lumber Co., 31 So., 994 (La. Sup. Ct.).
Bandie v. S. P. Co., 7 So. Rep., 792.

283 In this connection, and without quoting from the authorities cited, we refer to the testimony of Mr. H. P. Dart in answer to the seventh direct interrogatory, which was introduced in support of the plea to the jurisdiction. He says:

"On the 1st of June, 1905, and for many years prior thereto, the statutory authority for an action for personal injuries by the servant against the master was the Articles 2317 and 2320 of the Civil Code above quoted. * * * There is no statutory or codal provision in Louisiana on the subject of the relation of fellow servants, as a defense to the master. The question came before the Supreme Court of Louisiana in May, 1851, for the first time, and it was then decided that the master is not liable for damages resulting from the negligence of another servant, unless that other servant is habitually careless or unskillful. * * *

"I would answer further, on the case stated, that the engineer and fireman in the operation of the locomotive are fellow servants. * * *

"They (the engineer and fireman in this case) would be fellow-servants. I have cited the decisions in the former answer."

This conflict between the laws of Louisiana and Texas on vital features of the defense in this case is demonstrated in that it is an example of the very hypothesis used by Justice Gaines as an illustration in the case of R'y Co. v. De Harn, 86 Texas, 71.

In that opinion it is said:

"In order to illustrate this, let us take the case of a servant of a railway company who is injured by reason of the negligence of another employé of the same company. By statute, in some of the States of our Union, such corporations are held responsible for injuries which result from the negligence. Let us suppose
284 that in a State where the common law as to such liability is still in force, one employé of a railway company is injured by the negligence of his co-employé, and that the person injured is

carried into a State where the statute has established a different rule, and there dies; would it be proper for the courts of the State where the death occurred to hold the company liable for the consequences of the negligence of its servants, when, according to the laws of the State where the negligence occurred, no action would lie for such negligence?"

And in further support of our position on this conflict between the laws of Louisiana and Texas in the matter of defense, we again quote the language of the Supreme Court of the United States in the case of Slater v. Mexican National R'y Co., 194 U. S., 48 L. Ed., 900:

"But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally determines its extent. It seems to us unjust to allow the plaintiff to come here absolutely depending on the foreign law as for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

## Third.

From the evidence there appears to be more or less conflict between the laws of Texas and of Louisiana on the defense of risks assumed by the contract of employment; and this is especially true in view of the provision in the incorporating act of the Louisiana Western Railroad Company, whereby the latter is given rights of immunity and exemption from liability in this case, thus establishing rights and policies which do not obtain in Texas, nor exist at Common law.

285 The Louisiana Western Railroad Company was chartered by act of the Louisiana legislature, approved March 30th, 1878, and this company, since that date, has acted, constructed and operated its railroad for the transaction of its business in accordance with the provisions of that charter. Section 17 of this act, set forth in the foregoing statement, absolutely relieves and exempts the company from any liability, such as that which is sought to be charged in this case. At the time of passing and approving this incorporating act there was no provision in the Constitution of Louisiana prohibiting it. Provisions inserted subsequently in the Constitutions of 1879 and 1898 against special privileges, etc., could have no effect towards revoking or invalidating the privileges and rights theretofore extended to the Louisiana Western Railroad Company. This is practically adjudicated by the Louisiana court in Pecot v. Police Jury, 41 La., 707; 6 So. Rep., 677.

Referring to this incorporating act, the witness H. P. Dart testified:

"I do not know of any amendment or alteration by the legislature, or any other authority, altering or eliminating the language or effect of Section 17 of said Act, as quoted." (See bill of exception, Tr., p. 61.)

Again he says:

"I am not aware of any decision construing this particular provision of the charter of the Louisiana Western Railway Com-

pany. Other provisions of the same statute have been passed upon by the Supreme Court, thus the provision giving that corporation the right to expropriate property by special procedure was recognized and enforced in Louisiana Western R. R. Co. v. Central & Improvement Company, 119 La., 927, 44 So. Rep., 72."

Again, referring to this provision, Section 17, this witness says, in answer to cross-interrogatories:

286 "I should consider the provision valid. I have indicated this opinion in a previous answer, and I add this additional reason, that the right to recover for such injuries being statutory in Louisiana, it would seem reasonable, where the legislature has the right to create a corporation by special act that it would safeguard the grant or regulate or control rights or privileges under it, with the same validity that it could make the original grant." (See bill of exception, Tr., p. 75.)

And again this witness says:

"I am aware of no constitutional provision which nullifies or neutralizes the provisions of the charter aforesaid." (See bill of exception No. 1, Tr., p. 75.)

It is held by the courts of Texas that a railway charter is a contract between the State and the company, within the meaning of the Constitution, and cannot be affected by subsequent legislation or constitutions. (H. & T. C. R. R. Co. v. T. & P. Ry. Co., 70 Texas, 656.)

An act of the legislature must be held valid unless some superior law in express terms or by necessary implication forbids.

Harris County v. Stewart, 91 Texas, 143.
Whitemore v. Belknap, 89 Texas, 273.
Blum v. Nooney, 69 Texas, 4.
Orr v. Rhine, 45 Texas, 353.

In the case of U. & C. Insurance Company v. Chawning, 86 Texas, 654, it is said that the good or bad policies of a law are legislative questions over which the courts have no jurisdiction.

287 The provisions of Article 110 of the Constitution of the State of Louisiana are, in substance and meaning, the same as those of the Texas Constitution, and the same as the Constitution of the United States, in prohibiting the impairment of the obligations of a contract by subsequent legislation.

At the time of the passage and approval of this incorporating act, March 30th, 1878, there was in the State of Louisiana no right of action accruing immediately to any of the relatives for injuries resulting in death, this right of action being created as matter of general law by the amendment of 1884. We insist that, in view of the prior enactment of this charter, with its provision of immunity, the amendment of 1884 would not be construed as embracing or contemplating within the legislative intent, the liability of the defendant Louisiana Western Railroad Company in a case such as this; or if so intended, then that such amendment to this extent would have the effect of impairing the obligation of a valid and vested contract right in the railroad company, and hence would be violative of the Con-

stitution of the State of Louisiana and of the United States of America; and this contention is embraced and covered by pleadings in bar, and will be embraced more fully in subsequent portions of this brief. However, it is not our purpose to anticipate in this discussion the several questions that may arise in reference to the validity of this charter provision and its effectiveness as a plea in defense and bar of this action. Assuming that it is to be ultimately held invalid and of no force, for the reason that it encroaches upon the police power of the State, or for other cause, the question to be considered at this stage of the case and in connection with our plea in abatement is whether the courts of Texas, in a proceeding brought before it involving a transaction occurring in the State of Louisiana, will undertake to pass upon and denounce as invalid a legislative act of that State, when the evidence indicates, without dispute, that it has never been so adjudicated by the courts of the State of
288 Louisiana itself, but so far as the evidence discloses, has been upheld and acquiesced in and adopted as in line with the policies of that State.

In conclusion, without going into further detail upon contradictory features of the laws of the two jurisdictions of Texas and Louisiana, we merely call attention to the radical differences in the relative powers and discretions of the trial and appellate judges and the juries in the trial of fact cases, and to the fact that the general law of master and servant prevailing in Louisiana has its source, not in the common law, as in Texas, but in specific legislative acts and code provisions, and these acts and codes, in turn, are based on the principles of the civil law, and being, in the language of Mr. Dart, "*sui generis*, a conglomeration of many systems with the State statutes as a basis, and the impressions and convictions of the judges as a solution." (Tr. p. 65.)

### *Second Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the second assignment of error urged by appellants, and presented on page 48 of their brief on file, and the fourteenth assignment of error urged by appellants, and presented on page 168 of their brief on file, and embraced in paragraph second of the motion for rehearing, to the effect that the trial court erred to the prejudice of the defendants in overruling and refusing to sustain the special demurrers of said defendants and their special pleas of departure in pleading, and setting up the statute of limitations, to the effect that the plaintiffs' first amended original petition, filed in this cause May 19, 1908, for the first time alleged "that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the
289 damages sustained by them (plaintiffs) by the death of their said son, caused by their negligence as aforesaid, which statute is similar to the statute of this State, giving parents a right of action for damages for the death of their son as the result of negligence;" that such allegation, and the cause of action (if any) based theron

constituted a departure in the pleading from fact to fact, and from law to law, thus asserted for the first time, and the alleged injury having occurred June 1, 1905, said action was barred by the statute of limitation of the State of Texas of two years, and by the rule and law of prescription of one year of the State of Louisiana, which were duly plead, by way of exception and plea by defendants, and each of them, in bar of said action, and the court should have so held, and accordingly should have entered judgment in favor of the defendants.

## Statement.

The plaintiffs' original petition, filed in the District Court of Harris County, March 31st, 1906, reads in full as follows:

"To the Honorable District Court of Said County:

"Now comes Felix Gross and Theresa Gross, husband and wife, both — whom reside in Harris County, Texas, and are citizens thereof, who will be the plaintiffs herein, and complain of the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company and the Southern Pacific Company, defendants herein, and respectfully represent that the defendant Texas & New Orleans Railroad Company is a railroad corporation, duly and legally created and existing under and by virtue of the laws of the State of Texas, and that the defendant Louisiana Western Railway Company is a foreign corporation, domiciled in the State of Louisiana, owning and operating an extensive line of railway, and doing business and having a local agent in — upon whom service of cita-
290 tion may be had in this suit; and that the Southern Pacific Company is a foreign corporation, operating a system of railways, including the lines owned by the Texas & New Orleans Railroad Company and Louisiana Western Railway Company; that the defendant, Texas & New Orleans Railroad Company, owns and operates and extensive line of railway in Harris County, Texas, and is doing business and has a local agent resident in said county, upon whom service of citation may be had, and for cause of action respectfully represents:

"I.

"That heretofore, to wit, on or about June 1st, 1905, said defendants were engaged in some kind of a joint partnership arrangement between themselves, the exact details of which are unknown to plaintiffs, by which arrangement, among other things, the large majority of the stock of the defendants is owned or controlled in common by certain persons directing their affairs; that they solicit joint business, and make through rates for the carriage of freight and passengers over both of said roads, and divide the profits arising therefrom, and operate said lines as one continuous consolidated line between Houston, Texas, and a point in the State of Louisiana, to wit, Lafayette, and share between themselves the losses in operating said continuous line of railway, and use indiscriminately on one road or the other, as occasion may require,

the engines, rolling stock and employees of each other, and each of them hiring and discharging employés for both of said lines of railway, and each of them requiring the employés engaged by it to render services on the line of the other company; that their employés operating trains, are required to make the continuous run from Houston, Texas, to Lafayette, Louisiana, over the lines of both railways, though instructed to go through some formality of making out separate reports to each of the respective companies, which is done solely for the purpose of defeating the jurisdiction of the State courts.

"That on or about said date, while defendants were operat-
291 ing under said arrangements, plaintiffs' son, to-wit, Corley Gross, deceased, was in the employ of defendants in the capacity of fireman on a locomotive of a passenger train on the run from Houston, Harris County, Texas, through Calcasieu Parrish, to Lafayette, Louisiana; that on or about said date, said Corley Gross had left Houston with said train, about 7:20 p. m., on the night run, and had arrived or proceeded to within about seven miles of Sulphur Mines, Louisiana, at about 11:40 p. m., and was proceeding at the usual rate of speed, when the engine struck a beef or other animal on the track, and the engine and several cars were thereby derailed and turned over, and as a result thereof a great quantity of steam or hot water or hot oil confined about said engine, was permitted or caused to escape, and plaintiffs' said son, Corley Gross, was thereby scalded and burned to such an extent that he died therefrom about two weeks later; that the said Corley Gross was burned and scalded on the head, face, neck, arms and body in the most horrible manner, and the flesh thereof was cooked and caused to fall from the bones, and that for about two days prior to his death he was caused thereby to suffer great physical pain and mental anguish, and that he lost or was deprived of the possibility of making future earnings, as well as all other benefits of life.

"II.

"Plaintiffs allege that the death of their said son was directly and proximately caused and occasioned by the negligence and carelessness of the defendants, their servants, agents and employés, in the following respects, to wit:

"(*a*) In that they negligently and carelessly permitted cattle to get and remain upon defendants' right-of-way and upon their track, in said Calcasieu Parish, Louisiana, and thereby caused said derailment.

"(*b*) In that their right-of-way was not kept properly inclosed, and the gates of the inclosure properly closed, so as to prevent
292 cattle from getting upon said right-of-way and track.

"(*c*) In that defendants knew, or had notice, of such defective conditions of their inclosures, and that said beef or animal, as well as others, were upon their right-of-way and track several hours before the accident, or it was their duty to know it, and negligently failed to remove the same.

"(*d*) That plaintiffs' son did not know that said cattle would be

permitted to get and remain upon said right-of-way and track, and cause said derailment, and that plaintiffs' son was injured without fault or neglect on his part.

"(e) In that the ties supporting the rails at the place of said accident were old, rotten and defective and permitted the rails to spread and said engine to leave the track and turn over, as aforesaid.

"III.

"Plaintiffs allege that the said Felix Gross is the father, and Theresa Gross is the mother of said Corley Gross, deceased; that the said Corley Gross had no wife or descendants; that said Felix Gross was — years of age, and said Theresa Gross was — years of age, and that their said son, Corley Gross, deceased at the time of his death, was a strong and healthy man, twenty years of age, and earning and capable of earning one hundred dollars per month, of which amount more than seventy dollars per month was contributed to the support of his said father and mother, and he would continue to have contributed said amount to their support as long as they both lived, or either of them; that said Corley Gross left no widow nor children surviving him, having died unmarried; that by reason of the death of their said son these plaintiffs have suffered a pecuniary loss in the sum of twenty-five thousand dollars; that by reason of said injuries to said Corley Gross, and his losses occasioned thereby, he was damaged in the amount of twenty-five thousand dollars.

Plaintiffs further say that under the statutes of the States of Texas and Louisiana, the cause of action which Corley Gross
293 had against defendants for said injuries sustained by him, as aforesaid, survived to his said mother and father, the plaintiffs herein.

"The premises considered, the plaintiffs pray that the defendants be cited to answer this petition, and that upon final hearing they have judgment against the defendants for the amount of their said damages, as aforesaid, for all costs of suit, and for general relief, and for such they will ever pray." (St. of Facts, pp. 97-100.)

The plaintiffs' first amended original petition, which took the place of the petition above quoted, was filed May 19th, 1908, and after setting forth the causes, circumstances, surroundings and location of the alleged injury substantially as alleged in the original petition, with a little more detail, concludes as follows:

"That the plaintiff, Felix Gross, is — years of age, and the said Theresa Gross is — years of age, and that their said son, Corley Gross, at the time of his death, was a strong and healthy man, 23 years of age; that plaintiffs are and were without means of support of their own, and were dependent upon their said son for a support; that he was a dutiful son, and out of his earnings, which were, to wit, one hundred dollars ($100.00) per month, he contributed to their support more than seventy dollars per month, and he would have continued to thus contribute to their support as long as he lived, and they, or either of them, lived, and that by reason of his death they have been actually damaged in the sum of twenty-five thousand dollars ($25,000.00).

"Plaintiffs further represent that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them by the death of their said son, caused by their negligence, as aforesaid, which statute is similar to the statute of this State giving parents a
294 right of action for damages for the death of their son as a result of negligence.

"Premises considered, plaintiffs pray that defendants each be cited, according to law, to answer this petition; that, on trial hereof, they have judgment for their said damages, for costs of suit, and for general relief, and they will ever pray." (Tr. p. 9.)

The defendant Louisiana Western Railroad Company embraced and urged in its answer a special demurrer, reading as follows, to wit:

"And for further and special demurrer to that portion and paragraph of plaintiffs' first amended original petition, filed herein May 19th, 1908, and to the context thereof, which reads as follows, to wit: 'Plaintiffs further represent that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them by the death of their said son, caused by their negligence aforesaid, which statute is similar to the statute of this State giving parents a right of action for damages for the death of their son as a result of negligence'; the defendant avers that by such allegations, and by the context thereof, the plaintiffs have departed from their original pleading herein, as set forth in their original petition on file, which is referred to and made a part hereof, and that for the first time by said allegations, the plaintiffs seek and declare upon and assert a cause of action existing to them by virtue of a certain statute of the State of Louisiana, and that such alleged cause of action is set forth and sued upon by the filing of said amended petition May 19th, 1908, a date more than two years from and after the occurrence of said accident and death, and the accrual of said cause of action (if any plaintiffs have); and this defendant here now specially pleads in this connection, and by way of demurrer, the statute of limitation of the State of Texas as of two years, in bar of such right and cause of action (if any) accruing and existing to the plaintiffs by virtue of the aforesaid statute of Louisiana, and by virtue of the aforesaid allegations in said first amended original petition.

295 "And of this special demurrer this defendant prays judgment of the court, and that said allegations be stricken out and held for naught." (Tr. pp. 16 and 17.)

The defendant Texas & New Orleans Railroad Company also adopted and uged the special demurrer of its co-defendant. (Tr. p. 31.) These special demurrers were submitted in due order to the court, and were overruled, and to this ruling each of the defendants excepted. (Tr. pp. 35 and 36.)

*Authorities and Remarks.*

Phœnix Lumber Co. v. Houston Water Works Co., 94 Texas, 456.
Amer. Salt Co. v. Heidenheimer, 80 Texas, 344.
McLane v. Belvin, 47 Texas, 493.
Williams v. Randon, 10 Tex. 74.
Bigham v. Talbot, 63 Texas, 271.
R'y Co. v. Pape, 73 Texas, 502.
R'y Co. v. Wyler, 158 U. S. 285, 289, 298; 39 L. E., 987.
Whalen v. Gordon, (Cir. Ct. of Appeals, 8th Cir., Northern Dist. of Iowa), 95 Fed. Rep., 314.
Amer. & Eng. Enc. of Pleading and Practice, Vol. 1, pp. 622, 623, and 569 and 570.

The original petition in this case did not mention or declare upon any statute of Louisiana, giving a right of action to plaintiffs for damages sustained by them. The only reference in that petition to a Louisiana statute is that "the cause of action which Corley Gross had against defendants for said injuries sustained by him, as aforesaid, survived to his said mother and father, the plaintiffs herein". (St. of Facts, p. 100), thus referring to a right of survival created by the statute in Louisiana which did not exist in Texas at the time of the decision by our Supreme Court in
296 the case of T. & P. R'y Co. v. Richards, 68 Texas, 375, and which does not exist in the State of Texas now, for it will be noted that Chapter 89 of the General Laws of the Twenty-fourth Legislature of Texas for the year 1905 provides for the survival of actions "for personal injuries other than those resulting in death". Therefore the claim in the original petition for injuries to Corley Gross, and damages and loss sustained by him, and an action therefor by plaintiffs, based on the statute in Louisiana, giving the right of survival in their favor, showed no cause of action, and was subject to general demurrer. (R'y Co. v. Richards, 68 Texas, 375.) The other claim embraced in the original petition was: "That by reason of the death of their said son, these plaintiffs have suffered a pecuniary loss in the sum of twenty-five thousand dollars". And they afterwards prayed judgment for these items, but there is in that petition no reference whatsoever to, or declaration upon any law of the State of Louisiana in connection with this claim, so as to show jurisdiction in the Texas court, on principles of comity, to administer the statute laws of Louisiana (if any) applicable to the subject-matter (R'y Co. v. McCormick, 71 Texas, 660; De Harn v. R'y Co., 86 Texas, 71); and the Texas court having no power, under the decisions of this State, to take judicial notice of the statutory right of action of Louisiana created by the legislative amendment of 1884 (Faulk v. Faulk, 23 Texas, 653; Anderson v. Anderson, 23 Texas, 641; Bradshaw v. Mayfield, 18 Texas, 28; Trigg v. Moore, 10 Texas 200; Hill v. George, 5 Texas, 91; Bryant v. Kelton, 1 Texas, 434; Smith v. Smith, 1 Texas 625;

Jones v. Laney 2 Texas, 342-350; Blethen v. Bonner, 93 Texas, 141) was without jurisdiction over this claim on the face of the petition, and as to this feature of the case, it was subject to general demurrer. (De Harn v. Mexican National R. R. Co., 85 Texas, 71; Id. T. C. A. 22 S. W. 249; Mexican Continental R'y Co. v. Mitten, T. C. A. 36 S. W. 282; Mexican Continental R'y Co. v. Goodman, 48 S. W. 778. Hence the original petition set up
297 no cause of action cognizable by the Texas court, and was subject to general demurrer.

The amended petition abandoned the reference to the Louisiana statute giving the right of survival to the parents of the right of action which had accrued to Corley Gross for the injuries to him, and makes no claim in behalf of his parents for such loss and damage to him on the basis of a surviving action; but renews and amplifies the claim "that by reason of his death they (the plaintiffs) have been actually damaged in the sum of twenty-five thousand dollars." And in this connection, and as a legal basis for this claim, for the first time, the amended petition makes this allegation: "And that by reason of his death they have been actually damaged in the sum of twenty-five thousand dollars.

"Plaintiffs further represent that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them by the death of their said son, caused by their negligence, as aforesaid, which statute is similar to the statute of this State giving parents a right of action for damages for the death of their son as a result of negligence." (Tr. p. 9.)

Now we contend that the declaration thus made for the first time in the amended petition, on the alleged existence and effect of a statutory right of action and remedy in the State of Louisiana for the damages sustained by plaintiffs for the death of their son, involves such departure, as to the original petition, from fact to fact and from law to law, as to constitute practically the assertion of a new cause of action, and that limitation was not suspended by the filing of the original petition, but has run against this new cause of action, now asserted, up to the filing of the amended petition, more than two years after the date of the alleged occurrence, and the accrual of the cause of action (if any there be) in plaintiffs.
298 In the case of Phœnix Lumber Company v. Houston Water Works Company (94 Texas, 456), above cited, the plaintiff originally instituted suit for destruction of property by reason of insufficient water supply, alleging that the defendant water company had made an express contract to furnish such water; that plaintiff had succeeded to the benefits of this contract by assignment, and the same had been breached by defendants. Afterwards, more than eight years from the damage complained of, the plaintiff amended his petition, alleging, instead of an express contract, that by reason of certain practices, usages, customs, etc., the defendant had been furnishing water supply for the protection of plaintiff from fire, receiving certain sums therefor, and there had been thus created an implied contract and understanding on the part of defendant to

furnish said water supply. The defendant specially excepted to this amended petition on the ground that it constituted a departure from the original cause of action, and was a new cause of action, and was barred by the statute of limitation. This special demurrer was sustained by the trial court, and judgment rendered for the defendant, and this judgment was affirmed by the Court of Civil Appeals and the Supreme Court of Texas. Justice Brown, in delivering the opinion of the Supreme Court, says:

If the facts alleged in the sixth amended petition do not express substantially the same contract as that set up in the original petition, then the judgment of the court, sustaining the exception, must be affirmed. It is not sufficient that the causes of action be similar in their nature, but they must be essentially identical. Four tests are laid down by which to determine the identity of the causes of action: (1) Would a recovery had upon the original bar a recovery under the amended petition; (2) would the same evidence support both of the pleadings; (3) is the measure of damage the same in each case; (4) are the allegations subject to the same defense? Am. Eng. Enc. of Pl. and Pr., p. 556. We are of opinion
299 that the second and last furnish the best tests by which to determine the matter before us, and we can safely say that if the same testimony would not support the allegations in each of these pleas, and that the same defenses could not be interposed to each of them, they are not identical, and therefore the amended petition presents a new cause of action. (McLane v. Belvin, 47 Texas, 493; Bigham v. Talbot, 63 Texas, 271; Railway v. Pape, 73 Texas, 502; Railway v. Scott, 75 Texas, 84; Boyd v. Belville, 91 Texas, 439; Cotton v. Rand, 93 Texas, 24; Whalen v. Gordon, 95 Fed. Rep., 314; Scoville v. Glasner, 79 Mo., 449.)

If the case were on trial upon the original petition, the plaintiff would require to prove that the defendant contracted and agreed with the M. T. Jones Lumber Company to furnish to it water sufficient at all times to extinguish any fire that might originate upon the premises of the company, and that the M. T. Jones Lumber Company transferred that contract to the plaintiff. Also, that the property was destroyed by fire; that the plaintiff was prepared to apply the water, and used all necessary diligence to make application of the water to the fire, but that the defendant failed to furnish water in sufficient quantity to enable the plaintiff to extinguish the fire, from which cause the property was destroyed, and also to prove the value of the property. If the trial were upon the amended petition, the plaintiff must prove that it was prepared for applying water to fires, the circumstance relied upon to show that the defendant had undertaken to furnish water to it for the purpose of extinguishing fire, and that the defendant had negligently failed to furnish the water, whereby the loss had occurred. Evidence of an express contract would not be admissible under the allegations of, and, if admitted, would not establish, an implied contract, neither would the evidence from which the contract would be implied be admissible under the allegations of the original petition, nor would that evidence, if admitted, establish the existence of such a contract.

Against the original petition, the defendant could defend
300 by disproving the making of the contract, or by proving that it furnished the water according to the terms of the agreement. Proof that it did not make the express contract would not be admissible, nor would it disprove the allegations of the implied contract contained in the amended petition; but, in answer to the amended petition, the defendant would be required to meet a great number of circumstances and facts originating at different times and dates, arising out of transactions by different persons in its employ, all of which would be inadmissible in answer to, and would constitute no defense to, the original petition. The obligation, under the express contract, would be to furnish water, or to answer in damages for the failure to do so. Under the allegations of the implied contract, the defendant undertook to use ordinary care, and such means as persons or corporations engaged in a like business would use, to furnish water for like purposes.

"From the viewpoint of the plaintiff or the defendant, the allegations present different causes of action; they demand different proof of each party; they impose different duties upon the defendant, and are subjective to different defenses. If we consider the allegations as descriptive of an object, they reflect features and characteristics so essentially different that it is impossible that they could represent the same thing. If there were an express contract, there could be no implied contract arising out of the acts or performance of it; the one is destructive of the other. Two things which cannot coexist will not constitute one and the same thing."

In the case of Whalen v. Gordon (Cir. Ct. of Appeals) 95 Fed. Rep., 314, cited by our Supreme Court in the Phœnix Lumber Company case, practically the same tests are laid down as those adopted and set forth in the opinion of Justice Brown above quoted.

It will be observed from the opinion of our Supreme Court in the case of PhœnixLumber Company v. Houston Water Works
301 Company, above quoted, that the two tests applied in that case for the purpose of testing the identity of the cause of action are: (1) "Would the same evidence support both of the pleadings?" and (2) "Are the allegations of each subject to the same defense?"

Now, in the light of these tests, let us analyze the causes of action set up, or sought to be asserted, respectively, by the plaintiffs' original petition and the first amended original petition in the instant case, and determine whether they are, in the language of Justice Brown, "essentially identical."

In comparing the two petitions, we may disregard the claim in the original petition by plaintiffs for the damages and loss sustained by Corley Gross, himself, and which, under the statute of Louisiana referred to by them, survived in Louisiana, though not in Texas, as they there alleged; for this part of the case has been absolutely abandoned and eliminated by the amendment, and the reference to such statutory right of survival withdrawn.

Each of these petitions prays for damages to plaintiffs by reason of the loss accruing immediately to them from injuries in Louisiana, resulting in the death of their son. The first petition makes this

claim in a Texas Court, without any reference to or declaration upon the law of Louisiana, and which law the court, not knowing judicially, could not apply, and would rest the plaintiffs' case as made by the pleadings on the laws of Texas, which, extending no relief to the state of facts shown to have occurred beyond the limits of Texas, would leave the case so made demurrable. The amended petition, on the other hand, expressly alleged and declared upon, and rested the right to recover on, a statute of Louisiana, thus bringing an entirely new element into the case, which was as essential as any other fact alleged, and was indispensable to the jurisdiction of the court over the subject-matter. The two actions as thus presented by the original petition and the amendment were, respectively, (1) an action for injuries in Louisiana causing death, and depending for remedy and relief, before this court, on the laws of Texas;
302 and (2) an action for the result of such injuries based on the Louisiana statute giving such right of action.

The claims asserted in favor of plaintiffs in the two petitions to be compared for the purpose of this argument are for the damages to the plaintiffs, immediately vesting in them by the negligent death of their son through injuries occurring in Louisiana. In the first petition the location, circumstances and surroundings are alleged, and the evidence showing these matters would be the same as it would be upon a trial under the amended petition, but there being no allegation in the original petition as to the existence or effect of a statutory law in the State of Louisiana as a basis of the claim or declaration, manifestly there could be no proof of its existence or effect under the original petition, so as to support a judgment; but such evidence would be inadmissible and indispensable under the allegations of the amended petition, in order to sustain a judgment on the action asserted therein. Hence, applying one of the tests adopted by our Supreme Court in the opinion above cited: "Would the same evidence support both of the pleadings?" the answer would be negative.

Again, let us apply to the pleadings of the instant case the other test adopted by our Supreme Court. "Are the allegations of each subject to the same defence?" Taking the case alleged in the original petition, with reference to or declaration upon any statutory right of action of Louisiana or other law of that jurisdiction, and—if it be conceivable that the Texas court could take cognizance of the case, in any event, for the purpose of adjudicating it—there being no showing of the Louisiana laws, the court would treat the case as one subject to the laws of Texas, and thus limit the defenses of fellow-servant and assumed risk according to the Texas statutes on this subject, and would not have before it the important question, whether the amended act of 1884 of the Louisiana legislature impaired the obligation of the defendant's charter contract with that State; and thus the allegations of the two petitions, in several particulars, would not be subject to the same defenses.

Again, let us apply another of the tests mentioned by our Supreme Court in their decision above quoted: "Is the measure
303 of damage the same in each case?" In our statement and argument under the first ground of error ante pp. 4 and 10.

we have called attention to several elements of damage that are allowed under the Louisiana statutory right of action, which are not allowable under the Texas statute, and hence, in applying the laws of Louisiana declared upon in the amended petition, the measure of damages and recovery would be radically different from those of Texas applicable under the allegations and theory of the original petition.

The case of R'y Co. v. Wyler, 158 U. S., 285-298, 39 L. Ed., 987, cited with approval by our Supreme Court in the case of Phœnix Lumber Company v. Houston Water Works Company, involves facts and considerations which are closely analogous to those in the instant case, and we deem the decision squarely in point.

In that case, an action was brought by plaintiff in the Federal Court of Missouri for personal injuries to him in the State of Kansas, by reason of the conduct of one of plaintiff's fellow-servants in the employ of the railway company, it being alleged that the said fellow-servant was grossly incompetent, and that the railway company knew of such incompetency, and that plaintiff did not.

Subsequently, more than five years after the date of the injury, the plaintiff amended his petition, and set up and relied upon the statute of Kansas as fixing liability on the company for the negligent act of the fellow-servant, without regard to the master's notice of his incompetency. The defendant interposed a plea of limitation of five years under the laws of Missouri in bar of action, and this plea was sustained, on the ground that the amendment was such a departure in the pleading of plaintiff as to constitute essentially a new or different cause of action and that limitation had continued to run up to the time of the amendment.

Justice White, of the Supreme Court, in the opinion of the court, used the following language:

"The decision as to the application of the Missouri law involves, first, the ascertainment of whether the amended petition presented a new cause of action. The legal principles by which this question must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of
304 action in case of an amendment. In many of the States which have adopted the code system great latitude has been allowed in regard to amendment; but even in those States it is held that the question of what constitutes a departure in an amended pleading is nevertheless to be determined by the rules of common law, which thus furnish the test for ascertaining whether a given amendment presents a new cause of action, even although it be permissible to advance such new cause by way of an amendment.

"Sanders on Pleading and Evidence, pp. 806, 807, thus supports these authorities:

"A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made, and has recourse to another; it is when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not

support and fortify it. A departure may be either in the substance of the action or defense, or the law on which it is founded.

"The courts have, by their decisions, made application of these principles to changes in the facts averred, or law relied on, thus illustrating the rule in many aspects.

"The question then is, does the second amended petition state a new cause of action, so as to amount to a departure? In examining this question, we must bear in mind what is the common and general law governing the relation of master and servant, which prevails also in Missouri. By this law a servant cannot recover from a common master for injuries suffered from the negligence of a fellow-servant. However, where the master knowingly employs an incompetent servant, or where he keeps a servant in his employ after he has acquired knowledge of his incompetency, he is liable for damages caused to a fellow-servant, resulting from such incompetency. The statute of the State of Kansas, which makes employers operating a railroad liable to one servant for the neglect of another, without regard to the rule of incompetency, as above stated, is clearly in derogation of the general law, which, as we have said, prevails in Missouri, where the action was originally brought. Corbett v. St. Louis, M. & S. R. Co., 26 Mo. App. 621; Worheide v. Missouri Car & Foundry Co., 32 Mo. App., 367; Moran v. Brown, 27 Mo. App., 487; Bowen v. Chicago, B. & K. R. Co., 95 Mo., 268; Steffen v. Mayer, 93 Mo., 420.

305 "The first petition manifestly proceeded exclusively on that part of the general rule which holds the master liable who, with knowledge, employs or retains an incompetent servant. It made no reference to the Kansas Statute, and did not directly aver negligence on the part of the fellow-servant, except in so far as this might be inferred from the averment of his incompetency. The language is: that at the said time Kline was wholly incompetent and unfit for the position he occupied and the work he performed; that said incompetency was wholly unknown to plaintiff at the said time, though well known to defendant, and defendant negligently and wrongfully kept and retained said Kline in its employ with full knowledge of his incompetency.' In fact, when it charges the cause of the injury, the petition seems to eliminate all pretense of a right to recover because of the fellow-servant's negligence, as distinguished from his incompetency, by resting the right upon the latter, for it says: 'While engaged in such business, and without fault on the part of the plaintiff, and through the negligence and mismanagement of defendant in retaining and employing said Kline after knowing of his incompetency, the said heavy iron dump was carelessly and negligently thrown down and let fall.'

It seems impossible to conceive of language which could more directly rest the cause of action on the general or common law of Master and servant. And that this was the reliance is shown by the fact that when a demurrer to the petition was sustained, the amended petition for the first time specifically added to the charge of incompetency of the fellow-servant an unequivocal averment of his negligence.

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not per se a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action.

Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the States the laws
306 of other States are treated as foreign laws, which must be pleaded and proven. (Citing authorities).

"The amended petition, which averred the statute of Kansas, having asserted a new cause of action, the next question is, was recovery under this petition barred by the Missouri statute of limitations? The general rule is that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies."

Citing and quoting from decisions of the Supreme Court in case of Union Pacific Railway Company v. Wyler (158 U. S., 285, 39 Law. Ed., 983), the Main Supreme Judicial Court, in the case of Esther Anderson v. Wetter, 69 Atl., 105; 15 L. R. A., New Series, P. 1003, holds that a new and distinct cause of action is given by a statute permitting recovery for death resulting from personal injuries, and is a cause of action different from the old common law action which allowed recovery only for conscious suffering up to the time of death; and hence that, under the practice of that State, precluding a new and distinct cause of action from being set up by amendment, the statutory action could not be so asserted, when the suit, as originally instituted, declared merely upon the common law. And in support of this decision the Court quotes from the case of Union Pacific Railway Company v. Wyler as follows:

"The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of the cause of action under the common or general law to a statute giving a particular or exceptional right." (L. R. A., 115, New Series, pp. 1003 et seq.)

The editor, in his notes to the case above mentioned, cites
307 also the cases of Kansas City v. Hart, 60 Kansas, 684, 57 Pacific, 938; and Boston & M. R. R. Co. v. Hurd, 56 L. R. A.,

193; 47 C. C. A., 615; 108 Fed. Rep., 116, as supporting our contention that the action set up by the amendment in the instant case is distinctly a new cause of action, and is barred by the statute of limitation.

In Kansas City v. Hart, 60 Kansas, 684, 57 Pacific, 938, the plaintiff brought a common law action against the defendant for the loss of the services of his daughter, because of her death, due to the negligence of defendant. He was afterwards allowed to amend the complaint by allegation a cause of action in himself as next of kin, under the statute. A recovery was had on the amended declaration. On appeal the right to allow the amendment was not passed upon, but the amendment was held to set up a new cause of action, which was barred by the statute of limitations.

In Boston & M. R. R. Co., v. Hurd, 46 L. R. A., 193, 47 C. C. A., 615, 108 Fed. Rep., 116, the action was changed by amendment from one at common law, for injuries resulting in death, to a statutory action for death, and the power of the court to allow the amendment was apparently assumed. The plaintiff, however, was defeated on the ground that the statutory cause of action was barred by the statute of limitations.

In Vol. 1, pp. 569 and 570, Encyclopedia of Pleading and Practice, on the subject of amendments, the following language is used:

"Common law liabilities and statutory remedies for the same wrong are generally deemed separate and distinct grounds of action, not to be substituted one for the other by amendment; nor can one statutory remedy be converted into another."

*Third Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the fourteenth assignment of error urged by appellants, and presented on page 168 of their brief, and embraced in paragraph second of the motion for rehearing, to the effect that the trial Court erred, to the prejudice of each of the defendants, in overruling and refusing to sustain their special pleas of departure in pleading and setting up the statute of limitations, claiming that the plaintiffs' first amended original petition
308 filed in this cause May 19, 1908, alleged for the first time "that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them (plaintiffs) by the death of their said son caused by their negligence as aforesaid, which statute is similar to the statute of this State giving parents a right of action for damages for the death of their son as the result of negligence"; that such allegation and the cause of action (if any) based thereon, constituted a departure in pleading from fact to fact and from law to law, thus asserted for the first time, and the alleged injury and death having occurred June 1st, 1905, said action was barred by the statute of limitation of the State of Texas of two years, and by the law of prescription of one year of the State of Louisiana, and by the provisions of the Louisiana statute creating this cause of action, which

were duly and specially plead by defendants, and each of them, in bar of such action, and the court should have so held and accordingly entered judgment in favor of defendants.

*Statement.*

In our statement under the second ground of error, supra, we have set forth the original and amended pleadings of the plaintiffs in this case to show the departure involved between them, and we refer to that statement in this connection.

Both of the defendants, in addition to their special demurrers, setting up limitation, as hereinbefore mentioned, specially set up the facts showing departure in pleading, and urged the statutes of limitation of the State of Texas and of Louisiana by pleas in bar of the action. (Tr., pp. 24 and 25, and Tr., p. 33.)

The accident out of which this suit arose occurred June 1st, 1905, and Corley Gross, shortly after and during the same month, died. The plaintiffs' original petition was filed March 31, 1906, (St. of Facts, pp. 97-101), and made no reference to or declaration upon the statute law of Louisiana giving right of action to the plaintiffs for damage sustained by them through the death of their son. The plaintiffs' first amended original petition, which, for the first time, set up and declared upon a statutory right of action to plaintiffs for damage sustained by them, was filed May 19, 1908. (Tr., pp. 2-10).

309 For further statement in this connection, aside from the opinion from the Honorable Court of Civil Appeals, we refer to our statement made under second ground of error, ante pp. 32-37.

*Authorities and Remarks.*

Phœnix Lumber Co. v. Houston Water Works Co., 94 Tex., 453
R'y Co. v. Wyler, 158 U. S., 285, et seq., 39 L. Ed., 987.
Whalen v. Gordon, 95 Fed. Rep., 314.
Amer. & Eng. Enc. of Pl. & Pr., Vol. 1, pp. 622 and 623.
Id., pp. 569 and 570.

The point of law here involved is identical with that contended for in the second ground of error, supra. Being raised here by special plea in bar, instead of special demurrer, we deem it advisable to present it separately here in view of the testimony introduced in support of this plea, rendering the record more concrete for consideration of the point than it was under the demurrer on the face of the plaintiffs' Pleadings.

We have discussed the general principles and quoted to some extent from the authorities applicable here by way of authorities and remarks under the second ground of error, supra, and will not repeat these matters in this connection.

The Honorable Court of Civil Appeals, in that portion of its

opinion dealing with this point, as to the departure in pleadings, says:

"Anything necessary to be alleged in order to perfect something that is insufficiently pleaded, is the office of an amendment. The cause of action was asserted from the first. In the original petition it seems there was the allegation of a statute of Louisiana, but only in reference to the right to recover, by survival, the damages suffered by the deceased.

This allegation could properly be amended so as to include in the statute both forms of damage; and if the original petition had entirely omitted mention of the existence of any such statute, the allegation could be supplied by amendment."

We insist that this position of the Honorable Court of Civil Appeals is not tenable or applicable to the record in this case. The only reference to any statute of Louisiana, or declaration thereon, embraced in the original petition, was as to the survival of the right of action accruing to the deceased himself (if he had not died),
310 to certain of his designated relatives, which it was expressly held, in the case of T. & P. R'y Co. v. Richards, 68 Texas, 378, could not be entertained or prosecuted in this State. The amended pleadings of plaintiffs, on which trial was had, entirely eliminated this statutory right of action of Louisiana, which is mentioned in the plaintiffs' first pleadings, and for the first time declared on the statutory right of action in Louisiana, which was created by the amendment of 1884, giving right of action to the survivors for the damages sustained by them on account of the death, and this, we insist, involved a radical departure in pleading at least from law to law, and constituted the institution of a new suit on a different cause of action. (R'y Co. v. Wyler, 158 U. S., 285; 39 L. Ed., 987; Anderson v. Wetter, 69 Atl., 105; 15 L. R. A. (N. S.), 1003; Kansas City v. Hart, 60 Kansas, 684; 57 Pac., 938; Boston & Maine R. R. Co. v. Hurd, 56 L. R. A., 193; 47 C. C. A., 615; 108 Fed. Rep., 116.)

The only reference to the law of Louisiana embraced and declared upon in the plaintiffs' original petition is in the following language:

"Plaintiffs further say that under the statutes of the State of Texas and Louisiana the cause of action which Corley Gross had against defendants for said injuries sustained by him, as aforesaid, survived to his said mother and father, the plaintiffs herein." This was a claim on the part of plaintiffs to prosecute as survivors the right of action that had accrued to their son and survived to them upon his death under Article 2315 of the Civil Code of Louisiana, which reads as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; and the right of this action shall survive, in cases of death, in favor of the minor children or widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death." (See St. of Facts, p. 96.)

This statute, in so far as it creates a right of action in the injured party, is merely declamatory of the common law rule, or the "uni-

versal law"; but the provision for the survival of this action to the parents establishes a rule in derogation of, and unknown to, the common law. This Article 2315, in the form and to the
311 effect as above quoted, declaring the right of action in favor of the injured person for the injuries received by him, as it exists at common law, and creating the right of survival of this action to the relatives, a right unknown to the common law, was in existence as part of the code of Louisiana at and prior to the passage of the legislative act of 1878, incorporating the Louisiana Western Railroad Company, being embraced and published in the Revised Civil Code of Louisiana of 1870. (See St. of Facts, p. 96.) And this statutory right of survival is the point that was before our Supreme Court in T. & P. R'y Co. v. Richards, 68 Texas, 375; and which that court declined to recognize or enforce.

By the amendment of 1884 the legisluture of Louisiana added to the article above quoted the following: "The survivors above mentioned may also recover the damage sustained by them by the death of the parent or child, or husband or wife, as the case may be." (See St. of Facts, p. 102.)

And the Louisiana Court, construing this amendment of 1884, declared that it created "an obligation by expressly declaring the existence of a liability where there was none before, and opens the way for the recovery for its violation" (Van Amberg v. R'y Co., 31 La. An., 652; Eichorn v. R. R. Co., 112 La., 250; 36 S. R., 335); and the Louisiana court had held before this amendment that the former statute limited "the survivor's action to the right of action which the deceased would have had had he survived the injury." (Vrendenburg v. Behan, 33 La. An., 643. See St. of Facts, p. 103.) Therefore, the legislative amendment of 1884, embracing the added language above quoted, with its construction by the courts, fixed for the first time in the State of Louisiana the right of action and remedy thereunder, to the surviving relatives for damages "sustained by them" by reason of injuries resulting in the death of their kinsman.

It is manifest that the original petition does not seek to recover damages sustained immediately by the plaintiffs by reference to or upon the alleged basis of any Louisiana statute, but they merely seek to recover that which the deceased had a right of action for, and the right of action for which in him, according to their allegations, survived to them under the Louisiana statute. This right of survival, as above observed, and in accordance with the constructions placed upon these acts by the Louisiana courts, was a dis-
312 tinctly separate statutory right from the right of action immediately to the survivors for the injury sustained by them, created by the amendment of 1884; and the plaintiffs' reference to and declaration upon the statutory right of survival could not be construed as in any sense or degree a reference to or declaration upon a statutory right of action to plaintiffs for the injuries sustained by them in the death of their kinsman. The amended petition entirely abandons the reference to and declaration upon the Louisiana statute creating the right of survival in favor of plaintiffs of the

right of action which deceased might have enforced for the injury sustained by him, and for the first time makes reference in general terms to the statute law of Louisiana, enacted in 1884, creating the right of action in favor of the parents for the damage sustained by them in the death of their son.

Under the original petition proof of the Louisiana statute creating a survival to plaintiffs of the right of action of the deceased was admissible and material, and no other statutory right of Louisiana was material or admissible under that petition; and so, if the statute right as pleaded in that petition was not enforcible in our courts (as held in T. & P. R. R. Co. v. Richards, 68 Texas, 375), there being no other statutory right of Louisiana than this one referred to or declared upon, our Texas court would be thus left to consider the facts alleged by the original petition in the light simply of the Texas law (Blethen v. Bonner, 93 Texas, 141; Bradshaw v. Mayfield, 18 Texas, 28), and with the result that under the common law of Texas there was no right of action to plaintiffs for such damages sustained by them through the death of their son, while the Texas statute on the subject could not extend relief so as to cover an occurrence beyond the limits of this state (De Harn v. R'y Co., 86 Texas 71). But under the amended petition, filed May 19th, 1908, the evidence of the Louisiana statute creating the right of survival to the parents of the action in favor of deceased for injuries to him is absolutely irrelevant and immaterial, and not admissible for any purpose, and if admitted could not contribute in the slightest degree to sustain a judgment under the pleading, while, on the other hand, proof of the existence and effect of the right of action in Louisiana created by the amendment of 1884 became, under this amended petition, and for the first time in the history of this litigation, relevant, material and indispensable to sustain a judgment under the new petition.

313 Again, the act of 1878 incorporating the Louisiana Western Railroad Company in Louisiana contains a provision specially exempting the company from responsibility for negligent injuries to its train operatives, resulting in death, and granting it perpetual immunity against liability, and this provision has been pleaded in response to the action asserted in this amended petition, and it is contended by defendants that the amendment of 1884 creating a right of action for fatal injury in favor of the surviving relatives, if applied to the Louisiana Western Railroad Company, impairs the obligation of a pre-existing contract, and thus violates the State and Federal Constitutions, and is void; whereas, the statute of Louisiana declaring the existence of a right of action in deceased prior to his death for the injury sustained by him, and the survival of that right of action to his relatives in the event of his death, existed prior to and at the time of the incorporating act, and could not be said to impair the obligation of a contract, within the meaning of the State and Federal Constitutions, so as to make the suit presented in the original petition subject to this constitutional defense, or so as to involve the Federal questions here presented.

And again, under the original petition, in so far as the statutory

right of survival in Louisiana was referred to and declared upon, the measure of recovery was merely such elements as the deceased himself would have been entitled to recover under the Louisiana law, if he had not died (St. of Facts, pp. 103, 104), and if the general statement in that petition, "that by reason of the death of their said son these plaintiffs have suffered a pecuniary loss in the sum of twenty-five thousand dollars" (St. of Facts, p. 100), without referring to or making any Louisiana statute a basis of it, be treated in the light of the Texas laws, then the measure of damages under the Texas law could not have included the damage that deceased had sustained and was entitled to before his death, or the damage to plaintiffs by the loss of his society and companionship, or the mental anguish to the survivors because of his death, all of which are involved as legitimate elements of damage under the Louisiana statute now declared upon in the amended petition. (St. of Facts, pp. 103 and 104.)

So that the cases as set up in the two petitions require different evidence, are susceptible of different defenses and involved
314 different measures of damages; and thus the amended petition sets up a new and different cause of action from that in the original petition, according to the tests approved by our Supreme Court. (Phœnix Lumber Co. v. Houston Water Works Co., 94 Texas, 456.)

And whether this claim embraced in the original petition by plaintiff for damage and loss sustained by Corley Gross which he was entitled to recover during his lifetime, and which survived to plaintiffs under the Louisiana statute was to be considered in the Texas court by reference merely to the Louisiana survival statute declared upon (as involved in R'y Co. v. Richards, 68 Texas, 375), or in the light of the Texas statute for the injuries resulting in death, or the comon law as prevailing and applied in Texas (under each of which this court would have been powerless according to its decisions to extend relief), in either event this amended petition expressly declaring upon an alleged statute of Louisiana as affording the plaintiffs a primary right of action for damages sustained by them through the fatal injury of their son in derogation of the "universal law," involved a radical departure in the litigation, "from fact to fact and from law to law," and presented a distinctly new and different cause of action against which the statute of limitations continued to run until the amended petition was filed. (R'y Co. v. Wyler, 158 U. S., 285-298; 39 L. Ed., 987.)

For further views, together with quotations from authorities, in this connection we respectfully refer to authorities and remarks under second ground of error, ante pp. 37-51.

*Fourth Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the third assignment of error and the fourth assignment of error urged by appellants and presented on pp. 74, 78 and 79 of their brief on file, and embraced in para-

graph third of the motion for rehearing, complaining that the trial court erred in admitting the depositions of H. P. Dart, over the objection of defendants, as set forth and for the reasons stated in defendants' bill of exception No. 6 and No. 5, which are made part of the assignments, respectively, and for the following reasons, especially, to-wit: (1) That the evidence offered and introduced was
315 not admissible under the pleadings of plaintiffs; (2) that section 17 of the act of 1878 of the State of Louisiana incorporating the Louisiana Western Railroad Company was plead and proven without dispute, as a bar to the action, and the failure to recognize it as such on the part of the Texas courts would involve a refusal to give full faith and credit to the act of a sovereign State, and the amended Statute of 1884 of the State of Louisiana here offered and introduced in evidence over the objection of defendants, if applicable to the Louisiana Western Railroad Company, would impair the obligation of a contract theretofore entered into in reference to said immunity provision between the State of Louisiana and the Louisiana Western Railroad Company, and hence would violate the obligation of a contract, contrary to the United States Constitution *of* Statutes, and hence was not admissible; and (3) that the elements of damage allowed in Louisiana in a recovery by virtue of a statutory right of action in that State for injuries resulting in death, which were not allowable under the laws of Texas in similar cases, could not afford a basis for recovery in the Texas courts in such case, and were therefore irrelevant and immaterial, and should have been excluded upon objection.

And in this connection the conclusion of the Honorable Court of Civil Appeals, which reads as follows, in its opinion, is erroneous, to-wit: "It is true the proof of the Louisiana law developed that the statute of that State allowed compensation for loss of society and for mental anguish arising from the son's death, which are elements not allowed by our statute. Because our statute did not go as far as the Louisiana statute, and the latter includes more elements of damage than ours, affords no reason why the right of recovery attaching under the foreign statute should not, or cannot, be administered fully in this State."

*Statement.*

On the trial of this cause upon its merits, the plaintiff offered in evidence the testimony of H. P. Dart as an expert, to the effect that the State courts of Louisiana have certain statutes which are the basis of cases involving actions or claims for personal injury, and that by the passage of the act of 1884 of the legislature of Louisiana there was created a right of action for injuries inflicted in the State of Louisiana resulting in death, and that under such act the
316 plaintiffs in this case would be entitled to recover; also, that under this law, and according to the decisions of the Louisiana courts, the plaintiffs would be entitled to recover in such action the following items of damage:

(1) The damages the decedent might have recovered, had he lived, such as compensation for his pain and suffering, for his loss of

wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

(3) The damage sustained by the plaintiffs for mental suffering on account of the death of deceased.

The defendants, and each of them, objected to the introduction of such testimony on the following grounds:

(1) That the proposed evidence was irrelevant and immaterial; (2) that the statutory right of action, and the rules of law pertaining thereto, as applicable to such injury and death, occurring in Louisiana, were nowhere alleged or declared upon as a basis of action by plaintiffs in their pleading, and hence the evidence proposed was not admissible, under the plaintiffs' pleading; and (3) that the right of action created, or attempted to be created, by the Louisiana statute of 1884, in behalf of the designated surviving relatives, for the injury resulting in the death of the deceased, was so created, or attempted to be created, by the Louisiana legislature in the year 1884, and long after the passage of the act of 1878 incorporating the Louisiana Western Railroad Company in said State, and granting it the certain immunities and exemptions from liability expressed in Section 17 of said incorporating act, and after the said railroad company had acted in good faith in accepting the terms and provisions of said incorporating act, and acquired vested rights thereunder, and that the effect of said amended act of 1884, creating or attempting to create, such right of action as plaintiffs are asserting herein as against the defendants, tends to impair, and would impair, if enforced, the obligation of a contract, in violation of the Constitution of the United States and of the State of Louisiana and of the State of Texas.

317 Defendants' objections were overruled by the court, and plaintiffs were permitted to read and introduce the said evidence above mentioned, and to this ruling defendants, and each of them, excepted in open court, and were allowed their bill of exception No. 6. (Tr., pp. 87-92.) The petition makes no reference to nor declaration upon any law of Louisiana as basis of these elements of damage. (See Tr., pp. 1 to 10. See also bill of exception No. 5, Tr., pp. 84-87.)

*Authorities and Remarks.*

Evidence tending to show the existence of facts which are not alleged in the pleading as a basis of recovery, and which are not relevant or material to any issue made by the pleading, are not admissible, and it is error to admit the same. This is elementary.

(1) These laws of Louisiana bearing on the measure and elements of damage were substantial parts of the statutory right of action in that State, and the Texas court could not take judicial notice of them; and it was necessary to plead in order to prove them. (Hill v. George, 5 Tex., 91; Trigg v. Moore, 10 Tex., 200; Bradshaw v Mayfield, 18 Tex., 28; Blethen v. Bonner, 93 Tex., 141.

(2) The State of Louisiana having, by legislative act of 1878, created and incorporated the Louisiana Western Railroad Company, vested in it by Section 17 of that act a valid contract right of immunity and exemption from liability for injuries resulting in the death of its train operatives, such as Miller and Gross; and the amended statute of 1884 of the State of Louisiana, creating actions in favor of certain relatives for injuries resulting in death, in so far as it might be intended to apply to the defendant in this case, would impair the obligation of a contract, and thus violate the Constitution of the United States and of the State of Louisiana and of the State of Texas, and hence evidence of such statutory right of action brought about by said amendment, and the decisions construing the same, would be inadmissible. (Pecot v. Police Jury, 41 La., 707; 6 S. R., 677; La. Western R'y Co. v. Central and Improvement Co., 119 La., 927; 44 S. R., 732; Heirs of Gassin v. Williams et al., 36 La. An. 187; St. Julian v. Morgan's Louisiana & Texas R. R. & S. S. Co., 39 La., 1063.)

For the testimony of H. P. Dart in this connection, supporting our contention that Section 17 of this incorporating act is
318 valid, and that it would not be affected by the subsequent amendment of 1884, we refer to the testimony of H. P. Dart, St. of Facts, pp. 91-94.

For our further views in this connection, we refer to that portion of our argument in support of the first ground of error, relating to the validity of this immunity provision, ante pp. —.

(3) For the Texas courts to allow damages in this case to plaintiffs for the loss of the society of deceased, and for their own mental anguish, because of his death, would virtually amount to recognizing and enforcing rights of action which do not obtain in the jurisdiction of Texas, and which the Texas courts could not enforce on principles of comity. (R'y v. Richards, 68 Texas, 375; R'y Co. v. McCormick, 71 Texas, 630; De Harn v. R'y Co., 22 S. W., 249, 86 Texas, 71.)

One of the elements of damage to plaintiffs which the trial court permitted to be proven was "the damages that decedent might have recovered had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement," etc. For the Texas courts to allow this item as a basis of recovery in such a case is virtually to permit the plaintiffs to prosecute the action which deceased had for his injuries before his death, on the theory of a survival of such action to them, and thus to ignore and overrule the holding of the Supreme Court of Texas in Railway Company v. Richards, 68 Texas, 375.

*Fifth Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the fifth assignment of error urged by appellants, and presented on pages 81 and 82 of their brief on file, and embraced in paragraph fourth of the motion for rehearing, com-

plaining that the trial court erred, to the prejudice of each of the defendants, Louisiana Western Railroad Company and Texas and New Orleans Railroad Company, in its judgment and decree against them, and in the conclusions of fact and law upon which said judgment is based, in this: That under and by virtue of Section 17 of the act of the Legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, the said corporation was and is exempted from legal liability for the alleged injuries resulting in the death of Corley Gross, and such immunity and exemption
319 from liability was a matter of contract between the State of Louisiana and the said corporation, and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé; and the act of the legislature of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of said State so as to give, or attempt to give and create, the right of action asserted by plaintiffs in this cause, would have, and did have, the effect, if enforcible, of impairing the obligation of such contract, and thus would be and was violative of the provisions of the Constitution of the State of Lousiana, and of the State of Texas, and of the United States of America, and especially of Section 10 of Art. I of the Constitution of the United States of America.

And in this connection we insist that under the undisputed testimony, and according to the authorities cited by the witness H. P. Dart, on the subject of the Louisiana laws and decisions, Section 17 of the act of 1878, incorporating the Louisiana Western Railway Company was valid, under the Louisiana Constitution, existing at the time of its enactment, and remained and is so at this time, and the failure of the courts of Texas to so regard it and construe it, as a bar to this action, would be the failure to give full faith and credit to the act of a sovereign State, thereby depriving appellants of rights, privileges and immunities belonging to them under the Constitution and statutes of the United States; and moreover, the act of 1884, of the State of Louisiana, amending Article 2315 of the Civil Code, and for the first time undertaking to create a right of action upon which this suit is based, in so far as it might be applied to fix liability on the Louisiana Western Railroad Company in this case, would impair the obligation of a contract, and thus violate the Federal and State Constitutions.

And in this connection we insist that the Honorable Court of Civil Appeals erred in holding that the amendment of 1884, creating such right of action for injuries resulting in death, was in the nature of a police regulation or a penal act, passed in accordance with the reserve police power of the State.

### *Statement.*

320 The defendant Louisiana Western Railroad Company plead in bar of this action the provision of its incorporating act passed by the Louisiana legislature of 1878, exempting it from liability for injuries resulting in death of its train operatives, sought in

this case (Tr., pp. 19-21); and its co-defendant, Texas & New Orleans Railroad Company, adopted this plea. (Tr., p. 22.)

The testimony of Mr. H. P. Dart, who qualified and testified as an expert by deposition, gave a full history of the legislation of Louisiana on this subject, showing that this provision of indemnity in the incorporating act had never been abrogated nor held void, within his knowledge, giving his opinion, for the reasons therein stated, that it was valid, showing that at the time of its enactment it was not prohibited by any provisions of the State Constitution, and showing that the legislative act of Louisiana, creating a right of action for damages to survivors for injuries resulting in the death of a relative, did not exist at the time of the passage of this incorporating act.

Because of the importance which we attach to the testimony of this witness, and which we conceive to be practically without dispute, and because we regard this as a vital point in the case, we respectfully refer the court to our statement made under the fifth assignment of error, on pages 82-89, inclusive, of appellants Brief in this cause, filed in the Court of Civil Appeals, and which, presumably, accompanies this record.

*Authorities and Remarks.*

We have set forth fully in the statement above referred to the testimony of Mr. Dart, as an expert on the laws of the State of Louisiana, together with the authorities cited by him in that connection, showing the history of this incorporating act of the Louisiana Western Railroad Company and the subsequent legislation creating the right of action in Louisiana for injuries resulting in death; also the opinion of said witness as to the original and continuing validity of Section 17 of the incorporating act, with his reasons and authorities for such opinion; and deem it needless to review his testimony further in this connection.

The history and status of this legislation, as premises in support of our position, may be stated briefly as follows: At and prior to the time of passing the incorporating act of the Louisiana West-
321 ern Railroad Company containing Section 17, the immunity provision in question, there was no provision in the Constitution of Louisiana prohibiting such an act on the ground that it constituted the granting of Special or exclusive rights, privileges or immunities," etc., nor would the provision prohibiting such grants in the Constitution thereof adopted in Louisiana have a retroactive effect, so as to render the immunity provision void, if it was valid at the time of its enactment. (Pecot v. Police Jury, 41 La., 707; 6 So. Rep., 677.) The validity of this particular provision (Section 17 of the incorporating act) does not appear to have been before the Louisiana courts for interpretation, though other provisions of the same Constitution giving a special right and privilege, that of expropriation by special methods, was called in question and upheld in the cases of Louisiana Western Railroad Company v. Central & Improvement Company, 119 La., 924, 44 So.

Rep., 732; and a special right and privilege granted another corporation of Louisiana under the same Constitution, being called in question, was upheld and enforced by the Louisiana Courts. (Gassin v. Williams et al., 36 La. An., 187; St. Julian v. Morgan's La. & Texas R. R. & S. S. Co., 39 La. An., 1063.) So much for the history and status of the immunity provision as revealed by the legislation and court decisions of Louisiana.

At the time of the passage and approval of this incorporating act, March 30th, 1878, there was in Louisiana no right of action for injuries resulting in death, such as that which is sought to be invoked in this case. The Statute on the subject of personal injury, prevailing in Louisiana at that time, was Article 2315, which reads as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; and the right of this action shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these in favor of the surviving father and mother, or either of them, for the space of one year from the death." (St. of Facts, p. 95.)

The law continued in this form until the amendment of 1884, and was in this form substantially when the facts arose which were the subject of litigation in the case of Railway Company
322 v. Richards, 68 Texas, 375, in which our Supreme Court declined to entertain jurisdiction to enforce the Louisiana right of action in the survivors for recovery of the damage which deceased would have been entitled to had he not died, for the reason that no such right of action survived at common law or existed in the State of Texas. The amended act of 1884 by the Louisiana legislature added to the former act above quoted the following language:

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife, as the case may be." (St. of Facts, p. 102.)

And the Louisiana court construing this amendment of 1884, declared that it created "an obligation by expressly declaring the existence of a liability where there was none before, and opens the way for the recovery for its violation" (Van Amberg v. R'y Co., La. An., 652, Eichorn v. R. R. Co., 112 La., 250, 36 S. R., 335; and had held before the amendment that the former statute limited "the survivors' action to the right of action which the deceased would have had, had he survived the injury" (Vredenburg v. Behan, 33 La. An. 643). (St. of Facts, p. 103). Therefore this legislative amendment of 1884, with its construction by the courts, fixes the inception in the State of Louisiana of the right of action and remedy thereunder to the surviving relatives designated for damages to them by reason of injuries resulting in death of their kinsman.

We have plead this immunity provision in bar of the action. Up to the time of the amendment of 1884 there could have been no occasion to make this plea in such a case, for there was no such right of action prior to that time. So that, in so far as the immunity clause exempted defendant from responsibility to the relatives of

deceased for damages to them for the injury of the kinsman, resulting in death, it infringed no principles of the then existing law, and extended to defendant no special privilege or immunity under the contemporaneous status of the Louisiana law which was not shared equally by all other corporations and persons within the limits of the State. But the immunity vested in the defendant with reference to injuries resulting in death manifestly implied as to it a perpetual guaranty against the creation or infringement of such a right of action during the continuance of the charter
323 contract. For the period of proximately six years, from 1878 to 1884, this compact on the part of the State of Louisiana unquestionably was kept, for during that period no legislation was enacted rendering it possible to infringe this item of the immunity. Finally, this amendment of 1884 is enacted, upon which the plaintiffs in this case must prevail, if at all. Both of these acts proceeding as they do from co-ordinate authority of the State of Louisiana, the last act should be so interpreted and construed, if practicable, as to avoid conflicting with the former act and repudiation of the State's contract; and the feasibility of such construction is aptly suggested by Mr. Dart in his answer to cross interrogatories of counsel, as follows:

"I should consider the provision of Section 16 of the act of 1878, incorporating the Louisiana Western Railroad Company, valid. I have indicated this opinion in a previous answer, and I add this additional reason, that the right to recover for such injuries being statutory in law, it would seem reasonable, where the legislature has the right to create a corporation by special act, that it would safeguard the grant or regulate or control rights or privileges under it with the same validity that it could make the original grant." (St. of Facts, p. 94.)

In this connection, and as supporting this interpretation of the amended act of 1884, in its relation to the incorporating act of 1878, we refer briefly to the views expressed by our Texas courts. It is held that a railway charter is a contract between the company and the State, within the meaning of the Constitution, and cannot be affected by subsequent legislation or Constitutions. (H. & T. C. R. R. Co. v. T. & P. Ry. Co., 70 Texas, 656.)

"An act of the legislature must be held valid unless some superior law, in express terms, or by necessary implication, forbids." (Harris County v. Stewart, 91 Texas, 143; Whitmore v. Belknap, 89 Texas, 273; Blum v. Nooney, 69 Texas, 4; Orr v. Rhine, 45 Texas, 353.)

"The good or bad policies of the law are legislative questions over which the courts have no jurisdiction." (U. & C. Insurance Co. v. Chawning, 86 Texas, 654.)

Therefore, taking the history of this legislation in its entirety, with the constitutional environment, and in the light of the jurisprudence of that State and the decisions of its courts, giving due re-
gard to the fact, as appears, that it has not been the policy
324 to question the validity of this provision in the courts of Louisiana, we submit that the appropriate view of the Texas courts is that the legislature of Louisiana, by the amendment of 1884,

creating a new cause of action at law, did not mean to embrace within its terms the defendant Louisiana Western Railroad Company, thus repudiating and impairing the terms of a contract which had been accepted and acted upon by the company for a period of six years.

If, however, the amendment of 1884 is to be interpreted as applying to and embracing the defendant Louisiana Western Railroad Company, notwithstanding the immunity provision theretofore granted, then to such extent we insist the amended act was clearly void and of no effect, in that it infringed and violated the Constitution of the State of Louisiana, and Section Ten, Article 1, of the Constitution of the United States of America, by impairing or seeking to impair the obligation of a contract. Upon this point the only question open for discussion is whether provision 17 of the incorporating act was valid or void at the time of its enactment; for if valid as a proper exercise of legislative power at the time of its passage and approval, the defendant, thereupon having accepted the charter provisions as an entirety, and acted thereunder for a period of six years before this amended act, had acquired vested contract rights which could not be revoked by legislation. In former parts of this argument we have stated sufficiently our reasons, supported by some authorities and by reference to the testimony of Mr. Dart, an expert, for the position asserted that the provision is valid on the face of it, and has not been forbidden by any "other superior law in express terms or by necessary implication." The only point affirmatively urged against the immunity provision is that such an act would have the effect, pro tanto, of divesting the State of Louisiana of the power, through future legislation, to enact appropriate police regulations, and that the amendment of 1884 creating this right of action was, in its nature and substance, a police regulation, designed to preserve and protect the lives of the people within the limits of that State, and that the power to enact such legislation was paramount in the State, and could not be divested by legislative contract, and that such contract, if attempted, would be void. We shall not undertake here to discuss the
325 soundness of the principle involved in this contention, as an abstract proposition, or in cases which might properly involve its application; but we wish to point out briefly the fallacy involved in attempting to apply it here.

Assuming for argument the doctrine to be sound and broad as it is stated above, it is grounded essentially on the police power, and means that the sovereign State cannot be deprived of its inherent power to enact regulations for the protection of life, health and property. Is this amendment giving the right of action for injuries resulting in death within the State of Louisiana a police regulation? If not, the doctrine above stated has no bearing upon it. Let us analyze the amended act as it reads and has been construed, to determine whether its essential purpose is to protect and promote life, or to afford compensation to certain designated individuals in proportion to their damage sustained by reason of the death. If the main purpose revealed is to give compensation to certain private individuals, and it merely happens as a casual incident to such com-

pensation that punishment may result to the wrong doer, this coincident, we submit, would not give the law the character of a police regulation. The law as it now exists and is invoked in this case reads, with the amendment of 1884 in italics, as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; and the right of this action, shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them for the space of one year from the death. *The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband, or wife, as the case may be.*" (St. of Facts, p. 101.)

There is no provision by this amended statute for any right of action if there be not left surviving the deceased one or more of the relatives specially designated by the statute; so that if the purpose were a penalty to deter the wrong-doer in the interest of the public, then the act would have this effect only in the case of a person being killed who left one or more of such relatives; and if he did not leave one of such relatives, such person, under the law, could be killed with impunity. This, we suggest, forcefully demonstrates the weakness of the contention that
326 this act was intended by the legislature as an exercise of the police power of the State.

The witness H. P. Dart, in response to cross-interrogatory of plaintiffs' counsel, having reference to the aim of this amended act, says:

"I think the aim of our Louisiana statute is to give pecuniary compensation for the loss sustained. (St. of Facts, p. 105).

According to the testimony of the same witness, and the decisions cited by him, the elements of damage under the Louisiana statute, as recognized by the courts of that country, are stated as follows: (1) The damages the defendant might have recovered, had he lived, such as compensation for his pain and suffering, for his loss of wages or earnings, during the time intervening between the accident and his death, for his disfigurement, and for the expenses of his illness, etc.; (2) the loss by deprivation of the decedent's society and his aid and support, also the expense of his death and burial; (3) the recovery for mental suffering of the survivors; (4) vindictive or punitory damages are not permitted in an action for personal injuries against a corporation, etc.

We submit that the elements of damage that are included and allowed in the Louisiana act are strictly compensatory, and the exclusion of punitory damages as an element of recovery under that act is a circumstance forcefully refuting the contention that this act was designated as a police regulation. This immunity provision in the charter act, we submit, could in no sense or degree have the effect of restricting the State of Louisiana in the enactment and enforcement of adequate penal laws against reprehensible homicide, and thus leaves intact to future legislatures a full and free exercise of police power for the safety and promotion of human life in that State.

If further argument were required to refute the contention that

this amended act of Louisiana was designed to accomplish the essential purposes of police power, we might refer to the interpretation of our Texas statutes by the courts of this State. Indeed, it is not inappropriate that we should consider and adopt the effect of our own statute as a criterion in this connection; for if it be conceded that the essential purpose of our Texas statute is compensation, and not punishment, then, although it be conceded that the es-
327 sential and only purpose of the Louisiana act was punishment to the wrong-doer under a police regulation, and not compensation, then the Louisiana act being so radically different in its purposes from our Texas statute, this conflict in itself would afford an insurmountable obstacle to the enforcement of the Louisiana act in the courts of Texas. (R'y Co. v. Jackson, 89 Texas, 107; De Harn v. R'y Co., 86 Texas, 71; R'y Co. v. McCormick, 71 Tex., 660.) However, in the sense that the statutes of both States contemplated compensation to the surviving relatives mentioned, as their essential object and aim, they are very similar, and we may well resort to the language of the Texas statutes and decisions of our courts construing the same in this connection.

Article 3017, Revised Civil Statutes of Texas, reads:

"An action for actual damages on account of injuries causing the death of any person, may be brought in the following cases," etc.

Article 3021 reads:

"The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased."

Article 3025, Revised Civil Statutes, reads:

"If the sole plaintiff die, pending the suit, and he is the only party entitled to the money recovered, the suit shall abate."

The damages under Article 3017 recoverable, are for actual pecuniary injury, which resulted from the act complained of. (R'y Co. v. Cowser, 57 Tex., 293; R'y Co. v. Kindred, 57 Texas, 491.)

Damages under this article are awarded strictly as compensation, and not "upon principles of public policy." (I. & G. N. R. R. Co. v. McDonald, 75 Texas, 46; Hays v. R'y Co., 46 Texas, 272; R'y Co. v. Moore, 69 Texas, 157; R'y Co. v. Garcia, 62 Texas, 292.)

For further and full discussion of the distinction between that class of statutes, such as the Texas and Louisiana statutes, which have for their purpose compensation, and that class of statutes which have for their main purpose the punishment of the wrong-doer in the interest of the public, we respectfully refer to the able opinion of the Wisconsin court in the case of McMillan v. Spider Lake Saw Mill & Lumber Company, L. R. A., Vol. 60, pp. 589-592.

328 The Honorable Court of Civil Appeals urges as one of its main reasons for concluding that the special provision of immunity in the incorporating act was not valid to protect the railroad company against liability under the subsequent act of the Louisiana legislature of 1884, the contention that the latter act, creating the right of action for injuries resulting in death, was an exercise by the Louisiana Legislature of its reserved police power,

and that this was virtually a police regulation. For the reasons and in view of the authorities above cited, we insist that this position is not tenable. However, if it were true that this is to be deemed a police regulation, then it is clear, under the authorities, that the right of action is not transitory, and could not be enforced in the courts of Texas, or any other State beyond the jurisdiction of Louisiana. (Boston & Maine R. R. Co. v. Hurd, 46 L. R. A., 209, with note citing Higgins v. Central N. E. & W. R'y Co., 155 Mass., 176, and 29 N. E., 534; Nelson v. Chesapeake & Ohio R. R. Co., 88 Va., 971, 15 L. R. A., 583.)

*Sixth Ground of Error.*

The Honorable Court of Civil Appeals erred in its opinion and decision by refusing to sustain the sixth assignment of error, urged by appellants and presented on pages 99 and 100 of their brief on file, and embraced in paragraph fifth of the motion for rehearing, complaining that the trial court erred, to the prejudice of each of the defendants, in its judgment and decree against them, and in its conclusions of fact and law filed in connection with and in support of said decree, to the effect that the two defendants "were jointly engaged in the business of operating the said railways as one continuous line from Houston, in said Harris County, Texas, to Lafayette, in Louisiana, and in so doing used indiscriminately on either the engines, rolling stock and employés of the other, as the business or convenience required, and each hired for and discharged employés in the said joint business, and the employés hired by one were required to perform, and did perform, services on the railway of the other; that such employés made continuous runs on trains operated from Houston to Lafayette, and *vice versa,* and that both defendants were jointly engaged as common carries of freight and passengers for hire, between Houston and Lafayette over said railways, as a continuous route, and were partners in such business, sharing in the profits and losses thereof."

329 And the court erred in concluding, as matter of law, that the Texas & New Orleans Railroad Company was jointly liable with the Louisiana Western Railroad Company for the injury and death of the said Corley Gross, and in rendering joint and several judgment against the two defendants accordingly.

*Statement.*

The conclusions of fact and law complained of were in the language as above quoted. (Tr. p. 38.)

These conclusions of fact and law, and each of them, were duly excepted to by the defendants in open court, and such exceptions are duly entered as part of the record of final judgment. (Tr. pp. 36 and 37. See also Bill of Exception No. 7, Tr. p. 92.)

We insist that the conclusions of fact and law here announced by the trial judge and made the basis of his findings and of his judgment, holding defendants virtually as partners, and award-

ing a joint and several judgment against them, was not justified by, nor the logical effect of, the testimony, and that the Honorable Court of Civil Appeals erred in adopting the same, and the findings of fact as thus made in this connection and set forth in the opinion of the court are misleading and unfair.

We have made full statement, with accurate extracts from the testimony, on this feature of the case, under the head of statement, on pages 101-117, inclusive, of the appellants' brief in this case, filed in the court of Civil Appeals, which we assume accompanies the record before this Honorable Court, and we refer to that statement in this connection for the undisputed facts refuting the conclusion of partnership, or other such relation between the defendants as to justify the judgment against the Texas & New Orleans Railroad Company.

*Authorities and Remarks.*

In the light of the evidence quoted in the statement above mentioned, on pages 102-117 of appellants' brief on file, and without reiteration here, we submit that it does not disclose any such community of interest or division of losses or profits, or joint or mutual agency, as to create a partnership between the two railroad companies in law, and render them jointly and severally liable on such theory for the negligence of either of them on its respective line, according to the tests of a partnership relation. Indeed, we contend that the evidence, without dispute, practically contradicts the conclusions of fact on the point of division of profits and losses. (See testimony of G. R. Cottingham, St. of Facts, p. 78.)

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As illustrating our view of the effect in law of the methods of employment and payment and service of the train crews and other employés who worked, alternately, for one and the other of the defendants on the through passenger run, and the use of the same locomotives and cars on the through run, and the repair thereof, each company accounting and paying for the use and repair of same, according to the mileage and service on its respective line, and the fact of having some common officials between them, we refer to the opinion of the Supreme Court of the United States in the case of Peterson v. Chicago, Rock Island & Pacific Railroad Company, 205 U. S., 51 L. Ed., 851.

In that case the direct question of partnership, it is true, was not involved. Nevertheless the facts of that case in some respects, presented a status exceedingly similar to the instant case; and the expressions of the learned court upon the facts in their relation to the point of service involved, are illustrative, and tend to support our contention that, under the undisputed facts of the instant case, there could be no joint and several liability on the theory of partnership, or joint and mutual agency.

*Seventh Ground of Error.*

The Honorable Court of Civil Appeals erred in its opinion and decision by refusing to sustain the seventh assignment of error, urged by appellants, and presented on page 122 of their brief on file, and embraced in paragraph sixth of the motion for rehearing, complaining that the trial court erred in its judgment and decree, and in that portion of its conclusions of fact and law, being paragraph numbered 2, to the effect that the defendant companies owed a duty of using ordinary care to keep the gates closed, and that the employés operating the trains relied upon said companies to keep the gates closed, so as not to expose them to peril or danger of injury or death by derailment, and that the failure of defendants to keep such gates closed was negligence on their part,

331 proximately causing the injury and death, and rendering judgment accordingly against defendants for the injury and death; for the reason that according to the facts of the case, and according to the law applicable thereto, the said gates had been placed in the right-of-way fence for the use and benefit of third parties, and the Louisiana Western Railroad Company recognized the duty of said third parties to keep such gates closed, and relied upon their doing so, a fact which was understood by the train operatives, and accordingly the failure of the defendant companies to keep said gates closed was not negligence on the part of defendants, or either of them, rendering them liable for the alleged negligence and death.

*Statement.*

The gates were placed in the right-of-way fence of the defendant Louisiana Western Railway Company for the use of the adjacent land-owners and their tenants on the opposite sides of the railroad, and these gates were really of no service to the defendant, nor were they used by it. Reasonably effective appliances were provided for fastening these gates, and the defendant caused a printed notice to be posted on the gate, reading as follows:

"Notice.

"These gates and the crossing are for the exclusive use of the owners and occupants of the adjoining land. Such owners and occupants are hereby notified and warned to see that the gates are kept closed. The railroad company will not assume any responsibility for stock killed or other damage done by reason of these gates being left open.

(Signed) MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP CO.,
LOUISIANA WESTERN RAILROAD CO.,
"By W. F. OWEN, *Superintendent.*"

(St. of Facts, p. 32.)

As matter of fact, persons passing through and using these gates would frequently leave them unfastened and open, and thus allow live stock to get in upon the right-of-way and track, and the train crews generally knew that these gates were put in for the benefit of adjacent land owners, and that the latter were required to keep them fastened. (See Statement of Facts, testimony of J. A. Sobar, pp. 26, 27, 30; Map, p. 31; Notice, p. 32; testimony of Reese, pp. 7 and 8; Mallory, p. 33; E. E. Chackford, p. 40; Hildebrand, pp. 50 and 51; Bustin, p. 55; Lawlor, p. 62; Davis, p. 63; Stock Reports, pp. 64, 65 and 66.)

332 *Authorities.*

According to the laws of the State of Texas, the failure of the company to keep the gates closed at this crossing, having first provided proper fastenings, for the use of third parties, constituted no actionable negligence on its part.

R'y Co. v. Glenn, 8 Tex. Civ. App., 303; 30 S. W., 845.
R'y Co. v. Robinson, 17 T. C. A., 401; 43 S. W., 70.
R'y Co. v. Adams, 24 T. C. A., 236; 58 S. W., 1035.

There was no statutory law nor decision in the State of Louisiana requiring the fencing of this track, or holding that the failure to fence by the railroad company was negligence on its part.

The witness Dart, as an expert on the Louisiana law, testified in this connection as follows:

"There was no statute in Louisiana on the subject of fencing railroads, at the time of the injury complained of in this suit, or subsequently. I know of no decisions of the courts of Louisiana requiring railroad companies having and operating railroads in this State to fence the railroads or tracks.

"I am not aware of any case decided by our Supreme Court of Louisiana holding that the failure to fence a railroad might be taken into account by a jury in determining the question of negligence of the railroad company for injury to a passenger or employé by derailment of an engine or train." (See bill of exception, Tr., p. 62; St. of Facts, p. 93.)

*Eighth Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the eighth assignment of error, urged by appellants, and presented on pages 124-126 of appellants' brief, and embraced in paragraph seventh of the motion for rehearing, complaining that the trial court erred in rendering its judgment, and in its conclusions of fact and law upon which said judgment was based, and especially in that portion of its said conclusions of fact and law, being paragraph numbered 4, reading as follows, to-wit:

"I find that some hours previous to the derailment of Gross' loco-

motive, that another of defendants' trains had struck and
333 killed an animal of the cow species near the place of the derailment; and the carcass was allowed to lie upon the right-of-way within a short distance of a gate in the right-of-way fence, and that several hours prior to the derailment a number of cattle entered the right-of-way through the said gate, and were seen by employés of defendants in charge of one of defendants' east-bound trains, gathered about the dead one, holding a 'ceremony,' as expressed by one of the witnesses; that the said cattle were probably attracted upon the right-of-way by the dead one; and I find that defendants knew, or would have known by the exercise of ordinary care, of the presence of the dead animal upon the right-of-way, and knew, or would have known by the exercise of such care, that if the gate was open, cattle would probably be attracted therein by the dead one, or would enter therein of their own volition, and knew of the presence of the cattle, which were gathered about the dead one in time to have notified the conductor and engineer of the train of that fact, and in time to have had the said cattle removed from the right-of-way, and I find it was the duty of the defendants and the section men upon the section upon which the said cattle were, to have removed said cattle, or failing so to do to notify said conductor and engineer of the presence of said cattle upon the right-of-way, and that they could have notified them, and in that case they and said Gross could have been upon the lookout for said cattle, and probably avoided striking the one which they did, or have so slackened the speed of the train as to have prevented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be, and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, or in not giving the conductor and engineer of the train notice of their presence upon the right-of-way, and that such negligence was proximate cause of the death of Gross."

And in this connection we especially urge and insist that in order to sustain the judgment on the conclusion of fact found by the court in the fourth paragraph thereof, to the effect that the defendants were guilty of negligence in failing to remove from the right-of-way enclosure the cattle which were observed by their employé Reese, inside of the fence, or to notify the deceased of the presence of said cattle upon the right-of-way, and within such in-
closure, it was necessary to show by some legal evidence the
334 identity of the animal thereafter encountered by Miller's locomotive and causing the derailment as one of the animals theretofore observed by Reese, and there being no evidence in this case tending to show such identity, there is no *casual* relation shown in the record between the negligence found by the court, in his conclusions, and the injury complained of to support the judgment.

*Statement.*

With the firm conviction that the holding of the Trial Judge and the conclusion of the Honorable Court of Civil Appeals is

without any legal evidence in the record to sustain the necessary *casual* relation between the negligence as found, and the injury complained of, we respectfully ask that this court will indulge us in submitting here at some length, and in detail and literally the testimony in this connection, for this is the only method known to us by which this court can pass upon the question of law, whether there is any evidence to show the *casual* relation vital to the case asserted by plaintiffs.

The only testimony that the animals were inside the right-of-way fence at or near the track at the point of the derailment, and prior to the time thereof, or that any employé of defendant saw them there, was that of the plaintiffs' witness Reese, who testified that he was a fireman on a locomotive drawing a passenger train and going west, passing this point about 4:45 p. m., and that he saw one dead animal lying near the track, and four or five live cattle inside the right-of-way fence, looking at this dead one, and apparently holding a "ceremony" over him. (St. of Facts, pp. 2, 3, 6 and 7.)

We quote from the testimony of Reese, in this connection, as follows:

"I was a fireman drawing the regular passenger train known as "Second No. 5," running from the direction of New Orleans to Houston, and my train passed Sulphur Mine somewhere in the evening, during daylight. Sulphur Mine is a station on the Louisiana Western Railroad, located in the State of Louisiana, about ten or fifteen miles west of Lake Charles, and about twenty-seven miles east of Echo. Echo is located in Texas, on the west side of the Sabine River. The train that I was on upon this occasion got into Echo very late in the evening; the train that Mr. Miller was on, going east, passed Echo somewhere about 11 o'clock at night.
335 (St. of Facts, p. 1.)

"I am familiar with the point at which this wreck occurred—about three miles west of Sulphur Mine. The right-of-way is enclosed with a fence along by that point. On the evening before this wreck, when I passed this point, I saw cattle within the right-of-way fence at this point, and I saw a gate open, leading into the right-of-way at this point, as I passed on my engine. The cattle which I saw on this occasion were about 150 or 200 feet east of this gate. I saw four or five cattle in there, though I don't know exactly how many.

"When I passed on this evening, I saw one dead animal at this point, which looked like it had been killed. This dead cow was lying right close to the track, and the other cattle which were alive seemed to be holding a kind of ceremony over the one that was dead there. I did not see any other cattle lying down next to the track or close to the track beside the dead one. There were none of the cattle close around where the dead cow was that appeared to be crippled; their physical condition was perfect, so far as I know, excepting the one that was killed. The one that was killed was very close—three or four feet—from the end of the ties, I suppose. I saw it as my train passed by, and I could tell from

looking at it that it was dead. It had not been dead long, though I did not feel of it, and could not tell whether it was warm or cold, and, as matter of fact, could not say definitely how long that cow had been dead, but these other cattle were around there, standing off looking at it.

"When we got into Echo that night I did not, nor did my engineer, nor did anybody connected with my train, so far as I know, report the dead cow lying near the track near Sulphur Mine, nor other cattle being on the right-of-way. My regular engineer at that time was Lon Wilson, but he was not running the engine that evening. A man by name of Clark, who is supposed to be the traveling engineer, was in the engine with me, and running it, when we passed the point of the wreck. (St. of Facts, p. 2).

"I told him (Clark) that cattle were on the right-of-way. He said nothing to amount to anything; I don't know that he said anything at all. I told him there was a dead cow lying down there; the cow had indications of having been struck by an engine, and apparently that is the way she had been killed. (St. of Facts, p. 3.)

336 "Mr. Miller was the engineer in charge of the east-bound passenger train on that date, and I believe we met him that night at Amelia. The train he took out was known as the 7:20 train No. 8. He was pulling No. 8 which left the City of Houston at 7:20 p. m. Amelia is five miles west of Beaumont. (St. of Facts, pp. 3 and 4.)

"The train being drawn by Miller's locomotive was due at Sulphur Mine somewhere around 12 o'clock at night, and I had passed Sulphur Mine somewhere about 5 and 6 in the evening, while it was still daylight. (St. of Facts, p. 4.)

"When I passed by the point at which the wreck afterwards occurred, I saw one head of stock dead, and the others seemed to be looking at it. I am familiar with the private crossings equipped with gates on the road in Louisiana." (St. of Facts, p. 7.)

The train drawn by Miller, going eastward, reached the point of derailment, and the derailment occurred sometime between 11:25 and 12 o'clock at night. (See St. of Facts, pp. 48 and 49; testimony of Kimmer, St. of Facts, p. 32.)

W. H. Kimmer, a locomotive engineer operating a freight train on the Louisiana Western Railroad Company, testified as follows:

"On that date I left Lake Charles, going westward, to Echo. We got to Echo about 12 o'clock that night, June 1st, 1905; we passed the station of Sulphur Mine four times on that date; that is, making two round trips, passing Sulphur Mine on that day. On the first trip I passed Sulphur Mine and went to Echo, and then left Echo and went back to Lake Charles, and then I left Lake Charles at night, ging back to Echo, and passed Sulphur Mine at 11:07 p. m. Sulphur Mine is about two miles or a little over east of where the wreck occurred. I reached Sulphur Mine at 11:07 p. m., and continued on west towards Echo. It was west of Sulphur Mine where the derailment occurred, and the next station was Edgerly, and in going from Sulphur Mine to Edgerly we passed over the point at

which the wreck afterwards occurred. We met the passenger train that was being drawn eastward by Miller and Gross at Edgerly; we reached Edgerly and passed the east-bound passenger train there about 11:35 p. m. When we passed the point between Sulphur Mine and Edgerly, at which the wreck afterwards occurred,
337 and which place I am familiar with, my engine did not encounter any obstructions on the track, nor did I observe any stock there at that place, or about there. When I arrived at Vinton, after having met the passenger train at Edgerly, we were asked by the operator at Vinton, which was a night office then, if we delayed or stopped No. 8 at Edgerly, as she had not shown up at Sulphur Mine, which was another night office, and we told the operator that we did not, and on our arrival at Echo we heard of the wreck having occurred between Edgerly and Sulphur Mine, so that No. 8, the passenger train on which Miller and Gross were engineer and fireman, thus had not reached Sulphur Mine, and this was the cause of the inquiry made of us by the operator at Vinton. (St. of Facts, p. 52.)

Hildebrand, a locomotive engineer in the employment of the Louisiana Western Railroad Company at the time of this accident, testified: That he remembered the occurrence of the derailment near Sulphur Mine on June 1st, 1905, in which Miller and Gross were killed, and that he made a trip between Lafayette and Echo, as an engineer on a freight train upon that date. He said:

"I came from Lafayette to Echo on that date; I passed the scene of the wreck—where it afterwards occurred—about 8:30 p. m.; it was dark when I passed there; I know where the derailment occurred; I judge this place was about two and a half miles west of Sulphur Mine. In passing the point where the wreck afterwards occurred I did not encounter any stock, nor observe any, so far as I remember. I heard of the wreck that night, and after I had passed that point, if I had struck any stock there I would have known it; I did not strike any, nor observe any, that I remember. The train that my engine was drawing was a freight train that ended its run at Echo. It was operated over what was called the Louisiana Western Railroad. The superintendent of the road over which I operated, and to whom I reported, was Mr. Shackford. * * * I got to Echo on this trip at 9:30 p. m. I did not meet or pass the train that engineer Miller was operating; I arrived at Echo before he did." (St. of Facts, p. 50).

L. Lawlor, who was roadmaster of the Louisiana Western Railroad Company, testified:

"My division as roadmaster embraced the railroad between Lafayette, Louisiana, and Echo. My duties as roadmaster
338 were to look after the repairs of the track, keep up the track and fence, and everything else connected with the railroad.

"I remember the occurrence of the wreck and derailment of a passenger train near Sulphur Mine on the 1st of June, 1905, in which Miller and Gross, the engineer and fireman, were killed, and I know and am familiar with the point at which this wreck occurred, and know of the condition of the road and

track there and in that vicinity at the time of the derailment, and prior thereto. * * * On the day of the derailment, and previous thereto, I was upon train No. 60, a local freight, sprinkling the track with fuel oil, between Echo and Lake Charles, and passed over the point at which the derailment afterwards occurred. I passed along over this point about half past five p. m. The wreck afterwards occurred at that point about midnight. I was there after the wreck occurred. I went there to clear the wreck up that night after its occurrence. When I passed along there on the local train about half past five that evening before the derailment, I observed no stock within the right-of-way fences at or in that vicinity. I would have been very apt to have noticed any stock if they had been there at that time, because I was standing on the top of an oil car attending to the valves and was sprinkling the track with oil to kill the grass on the track. From that point the train that I was on went on to Lake Charles." (St. of Facts, p. 60.)

G. E. Bustin, who was section foreman, and had in charge the portion of the road upon which this derailment occurred, testified that he passed along over this track on June 1st, 1905, going out over it to the west in the morning and returning in the evening. He testified further:

"On this occasion I found the gates open during that day some time; I don't remember what time of day, but I shut the gate that day. There was only one of the gates that I found open. At that time I found no cattle in there whatsoever. I can't remember what time of day it was that I found this gate open and shut it; I know I shut and closed the gate that day; my report shows I did, and I know I did it that day, but I don't remember whether it was in the morning or evening that I shut it, but my report showed that I shut it on that day. I went home from work that evening somewhere about 6 o'clock; I got into Sulphur Mine probably a
339 few minutes later than 6; I had my section crew with me." (St. of Facts, p. 55.)

*Train Sheet Showing Passage of Trains by Point of Accident from Time Reese Observed Cattle until Time of Derailment.*

In connection with the testimony of the witness Shackford, who was Superintendent of the Louisiana Western Railroad Company, and in whose office and under whose supervision the train sheet was kept, and who identified and vouched for its accuracy, this train sheet was introduced in evidence by defendants, and its full effect on the points here involved is set forth on pages 47, 48 and 49, statement of facts, as follows, to wit:

"The train sheet here introduced in evidence consisted of a tabulated statement in the original hand-writing of the train dispatchers on duty, covering the train operations and movements on the railroad extending between Lafayette and Echo, during the twenty-four hours of June 1st, 1905, beginning at 12:01 a. m. of that date and closing with 12:01 a. m. June 2nd, 1905. This train sheet contains a printed list, beginning with Lafayette and showing in their

order the several stations between that point and Echo, and showing the distances between these respective stations, as follows:

"Lafayette, 5.14 miles to Scott; 10.36 miles to Rayne; 6.35 miles to Crowley; 6 miles to Easterwood; 2 miles to Midland; 5.49 miles to Mermenteau, 4.94 miles to Jennings; 5.63 miles to Roanoke; 5.08 to Welsh; 10.47 to Iowa; 11.35 to Lake Charles; 2.32 miles to West Lake; 7.73 miles to Sulphur Mine; 7.73 miles to Edgerly; 5.41 miles to Vinton; 5 miles to Tumey; 4.76 miles to Echo.

"This train sheet shows that during the twenty-four hours of June 1st, 1905, there were operated over the line of road extending between Echo and Lafayette and passing the point of the wreck, twelve regular and extra trains going west, and fourteen regular and extra trains, including the wrecked train, going east.

This train sheet further shows by its tabulated entries, the following train movements:

"That first section No. 5 (a passenger train drawn by engine 257, Dobbins, engineer, a west-bound), left Lafayette at 1:18
340 p. m., June 1st, 1905, passing Sulphur Mine Station at 4:25 p. m., passing Edgerly at 4:39 p. m., and reaching Echo at 5:15 p. m., June 1st, 1905.

"That second section No. 5 (passenger train, drawn by engine 251, with Wilson as engineer on which the witness Reese was fireman—going west), left Lafayette at 1:28 p. m., June 1st, passing Sulphur Mine at 4:39 p. m., passing Edgerly at 4:49 p. m., and reached Echo at 5:20 p. m., June 1st, 1905.

"That train No. 245, drawn by Engine 194, with Hildebrand, engineer, a freight train, going west, left Lafayette at 1:45 p. m., June 1st, passing Sulphur Mine at 8:15 p. m., passing Vinton at 8:55 p. m., and reached Echo at 9:30 p. m.

"That extra freight train drawn by engine 213, with the witness Kimmer, engineer, going west, left Lake Charles at 10:30 p. m., June 1st, 1905, passing Sulphur Mine at 11:07 p. m., reaching Vinton at 11:53 p. m., leaving Vinton at 11:56 p. m., and reaching Echo at 12:15 a. m., June 2d, 1905.

"That local freight train No. 60 drawn by engine 173, going east, left Edgerly at 4:29 p. m., June 1st, 1905, reached Sulphur Mine 6:50 p. m., left Sulphur Mine 7:12 p. m., and reached Lake Charles at 8:35 p. m.

"That passenger train No. 8, drawn by Engine 250, with engineer Miller (deceased) in charge, going east, left Echo at 11:02 p. m., June 1st, 1905, left Vinton at 11:23 p. m., met and passed west-bound extra freight drawn by Engineer Kimmer, at Edgerly (time not noted on train sheet, but, according to testimony of Engineer Kimmer, about 11:35 p. m.), and No. 8 then disappears from the train sheet before reaching Sulphur Mine, with the following memorandum noted on train sheet: 'Wrecked 1¼ miles west of Brimstone'. Brimstone is shown (on the map of the L. W. Railroad, attached to the printed time cars introduced) to be situated between Edgerly and Sulphur Mine, close to the latter place, but the place referred to as Brimstone in this memorandum is not indicated in

the list of regular stations on the time card or train sheet." (St. of Facts, pp. 47, 48, 49.)

Only one animal was killed in the wreck, the other dead one found there having been killed some time before, and doubtless being the same that was observed by Reese, and there was no evi-
341 dence of identity between the animal causing the derailment and any of those observed by Reese, as disclosed by those observing them after the wreck. (See testimony of Long, St. of Facts, pp. 11 and 12; Bustin, pp. 55, 57 and 58.)

J. P. Long, a witness for the plaintiffs, testified that he was a passenger on the train which was derailed near Sulphur Mine June 1st, 1905; that he was in the rear sleeper at the time of the derailment; he got up and went forward, looked at his watch and found it was 11:45 p. m., that he walked ahead through the sleepers and got out on the south side of the train; that afterwards he crossed over on the north side, and when he got up about half-way between the front of the rear end of the second coach and was crawling on his hands and knees he put his hands on a warm animal that was lying on the track directly under the coach. In this connection he said:

It was dead, and had been dragged some distance from the west, going east, and it was lying then north, on top of what was the original roadbed; it was warm, and was a large animal. I was there where the animal had been dragged on the gravel; where the animal had been dragged in some manner under the engine and coaches.

"We stayed there at the wreck until about daylight. The relief train came in a little before we left, and I understand it took these men away.

"I did afterwards observe another animal there in the vicinity of the wreck besides the large on- I heretofore mentioned. After the engineer and fireman were placed on the train I crossed over on the south side and walked west. I crossed over on the platform of the passenger coach, to the south side, and walked west, and when I got about 100 feet, or probably 125 feet, from where this animal (the first animal) was lying, and partly under the coach on the south side of the track I found a large yearling that was badly bloated and cold, lying some seven or eight or ten feet from the track on the south side, and it had been dead apparently thirty-six to forty-eight hours; it was bloated, and was probably ten or twelve feet, or a little more, from the south side of the track. There was no wreckage about it. It had been struck by a west-bound train, and I say it had been struck by a west-bound train from the posture the animal was lying in, and also the
342 ground showed it had been that way. This yearling was somewhere about on the south side of the track where the rear end of the rear sleeper, or the last car of the train, stood. The cars that were by the yearling were still on the track; all the coaches, both sleepers, the first-class and a part of the second-class coach were on their trucks; they were on the rails; the head coach was not on the rails, but the second coach from it was on the rails, I think the rear trucks, and the other cars were all on the track, including

the two sleepers. I suppose it was a distance of 200 or 250 feet from the location of this yearling up eastward to the wreckage. There was no indication that any portion of this train had come in contact with the yearling; it could not have been so; the yearling was lying down about fifteen feet from the end of the ties on the south side of the track." (St. of Facts, pp. 11 and 12.)

G. E. Bustin, the section foreman, testified with reference to the dead animals, as follows:

"There was only one head of cattle that had been killed that night. It was a big bull. I think, and was red; I never saw this animal before the derailment; that was the first time he had ever been on that right of way, so far as I know. I did not see any other cattle in there that night or the next morning; I did not get any cattle out of there on that day after the wreck; I looked to see if there were any cattle within the right of way the next morning after the wreck, and did not find any, and this one that was killed was the only one on the inside at that time. I did see another dead animal in there the next morning; there was a dead yearling that was killed the second day before this occurrence, right at the same place; it came through this gate. The people had a practice of leaving gates open in going through there, and I had to shut it every day. This other animal that was killed was a yearling, and had been there from the second day before this wreck happened; it was right even with the gates; right at the crossing, I think it was; I suppose about fifty yards west of the crossing where this yearling was killed. This yearling was lying on the south side of the track, down in the dump, on the west side from the crossing, about fifty feet west of the crossing on the south side of the track; that was not the side that the bull was on; the bull was on the east side of the crossing and
343 it was on the north side of the track when I got there; it had been dragged out from under the trucks. The bull and the yearling were on opposite sides of the crossing. I guess they were about 100 yards apart. I had never seen either of these animals in there before that I know of; I cannot say that I had seen these same ones." (St. of Facts, pp. 57 and 58.)

*Authorities and Remarks.*

The theory of actionable negligence on the part of the defendants found by the court as conclusions of fact, upon which he bases the judgment, is that (1) the defendant knew the cattle had entered through an open gate into the enclosure of the right-of-way, and upon or near the track; (2) that the defendant owed the duty to remove the cattle, or to notify Miller of their presence within the enclosure, and the failure to do so was negligence; and (3) that the failure to remove the cattle observed by Reese within the enclosure, or to notify Miller of their presence therein, was the proximate cause of the derailment, and without which it would not have occurred.

We contend that a searching analysis of the entire evidence will demonstrate an utter failure to establish any *casual* relation

between the omissions of duty found by the court and the derailment of Miller's engine. The only witness whose testimony could possibly afford any support to the court's conclusion that some hours before the derailment a number of cattle were seen by members of a train going east inside the right-of-way fence, and that defendant knew this fact, or could have known it by ordinary care, was the fireman Reese, who testified in substance, that when passing this point in the afternoon, as the train-sheet shows, between 4:39 p. m. and 4:49 p. m., he saw one dead animal lying near the track and south of it, and four or five live cattle inside the right-of-way fence looking at this dead one, and apparently holding a "ceremony" over him. (St. of Facts, pp. 3, 4, 7 and 8.) There is absolutely no evidence that the defendant actually knew this fact, unless it be said that the observation of Reese himself and his companion, Clark, *were* such knowledge of defendant. Let this be assumed and conceded, for argument's sake, that the knowledge and observation of Reese, as related in his own language, were chargeable to defendant. Thus we have the fact, within defendant's knowledge, that when Reese passed this point about 4:45
344 p. m., as shown by the train sheet, there was one dead animal lying south of the track previously killed at some uncertain time, and there were four or five other cattle, with no special description to identify them, standing inside the right-of-way fence near the dead animal, and in the vicinity of the derailment. The train that Reese was firing on, as shown by the train sheet, passed Sulphur Mine, a station two and one-half or three miles east of the point of derailment, at 4:39 p. m., and passed Edgerly, a station a short distance west of this point, at 4:49 p. m. The train drawn by Miller and derailed, going east, passed Vinton, a station west of the point of accident, at 11:23 p. m., as shown by the train sheet, and met engineer Kimmer at Edgerly, 5:41 miles further east, and was derailed before reaching Sulphur Mine, the derailment occurring, according to the testimony of plaintiffs' witness J. P. Long, who looked at his watch at the time, at 11:45 p. m. (St. of Facts, pp. 11 and 12.) Thus, about seven hours had elapsed from the time that Reese saw the cattle in the daylight until the derailment occurred by reason of collision with a large animal of the cow species, described by one of the witnesses as having the appearance of a *big* bull. (St. of Facts, pp. 11 and 12.) We submit that the mere coincident of Reese having seen the four or five live cattle and a dead one within the right-of-way fence in the daytime at 4:45 p. m., and that the train drawn by Miller, going eastward, struck in the vicinity of this point a large animal at 11:45 p. m. seven hours afterwards, standing alone and in itself, would have no probative force even tending to sustain a finding that the failure to drive out the cattle observed by Reese and close the gate, or notify Miller, was a proximate cause of the derailment, and without which it would not have occurred. This coincidence would necessarily require some further evidence, some circumstance of probative force, at least, going to identify the animal killed as one of those observed by Reese. But the various circumstances and environments of this occurrence,

instead of making it probable that this was one of the animals observed by Reese, and that it had remained at this point from the time he passed up to the time of the derailment, tend rather to the contrary and neutralize any significance that might be attached to the fact of striking the animal where Reese, seven hours be-
345 fore, had observed four or five head of cattle.

There was absolutely nothing to identify the animal struck as one of those observed by Reese in even the circumstance of number; for this was the only animal struck on that occasion by Miller's engine, and none other, living or dead were observed either that night or the next morning within the enclosure, except a dead and bloated yearling located about 100 yards west of the wreck, which had been killed two days before. So that if the large animal causing the wreck had been one of those cattle observed by Reese, it had been separated from its herd during the seven hours that had elapsed before the derailment. During this period of seven hours from the time that Reese saw the cattle up to the time of the derailment, several of those who have testified as witnesses in this case passed the point and did not observe the presence of any cattle, although they had the opportunity to do so if those cattle had been or remained there. The section foreman, Bustin, went by this point, going west, to his work in the morning and repassed again in the afternoon about 6 o'clock, going home. From his memorandum book he found that he had closed one of these gates, either going out or returning on that date, but at that time he saw no stock within the enclosure. (St. of Facts, pp. 57 and 58.) Three trains passed this point during the seven-hour period, without either observing or encountering any cattle in this vicinity.

The roadmaster, L. Lawlor, was on top of a car, sprinkling the roadbed and track with oil, and was in position to observe stock if they had been within the enclosure when he passed. According to his testimony, he passed this point about 5:30 p. m. The train sheet indicated that the train which Lawlor was on, a local freight, passed Sulphur Mine, going east at 6:50 p. m., having passed the point of the accident after the time when the cattle were observed by Reese (St. of Facts, p. 60.) Hildebrand, the engineer on train No. 245, going west, passed Sulphur Mine at 8:15 p. m., and Vinton at 8:55 p. m., according to train sheet, thus passing the intermediate point at which derailment occurred between these times, and neither did he encounter nor observe any stock within this vicinity on the right-of-way. (St. of Facts, p. 50.) And finally, Kimmer, engineer on 213, drawing an extra freight train, going west, is shown by train sheet to have passed Sulphur Mine at 11:07 p. m., and Vin-
346 ton at 11:53 p. m., having passed the point of derailment between these times, and he met and passed the train drawn by Miller at Edgerly, and thus a few minutes after Kimmer had passed over the point of derailment, without observing or striking any stock, Miller's engine, going eastward, struck the large animal and was derailed at 11:45 p. M. (St. of Facts, pp. 47-49.)

In view of the facts and circumstances above recalled, and considering the probability that, whether those cattle had

been removed by defendants' employe and the gates closed or not, third parties passing through the gates and crossing the track were likely to have left the gates unfastened, and thus allowed stock to get in at any time during the lapse of the seven hour period, we submit that there is no testimony or circumstance of any probative force amounting to legal evidence of identity between the animal causing the derailment and any of those animals observed by the witness Reese (Lee v. R'y Co., 89 Texas, 583; Choate v. R'y Co., 90 Texas, 88); and we insist that no inference can be reached upon the record in this case, that the failure to report what Reese observed, or to remove the cattle seen by him, was a proximate cause of the derailment, and without which it would not have occurred—except by "basing one inference on another, which the law will not permit." (R'y Co. v. Porter, 73 Texas, 306)

*Summary.*

The material facts in the record bearing on this vital point of *casual* relation and their logical effect in this case, as we conceive it, may be summarized as follows:

The witness Reese, the only person who saw any animals on the track at the point of the accident on that date, passed the point between the hours of 4:39 p. m. and 4:45 p. m., and on passing saw one dead animal south of the track, and four or five others inside of the right-of-way fence around the dead one, without being able or undertaking to give any special description of these live cattle; that the train with which Miller and Gross were engineer and fireman reached the point of the accident, going in the opposite direction from that of Reese, at 11:45 p. m., encountering one large animal (said by those who observed it after it was killed to have been a big bull), causing derailment, and at the time of the accident no other cattle were encountered or observed at this point. Between
347 the time when Reese had observed the several animals at this point, and the time when Miller's locomotive encountered the one animal at that point there had been a lapse of about seven hours. In the meantime, the section foreman Bustin, at 6 p. m., the roadmaster Lawlor, at 6:50 p. m., the engineer Hildebrandt at 8:15 p. m., and the engineer Kimmer at 11:07 p. m. had passed the point of the accident and observed no cattle on or near the track or within the right-of-way fence at this point; and the evidence showed without dispute that people residing on either side of the railroad in the vicinity of this point made a practice, night and day, of passing through the right-of-way gates, frequently leaving them open on such occasions, so that cattle indiscriminately would have access to the right-of-way and road-bed, and would enter upon it. Thus we insist, in the light of the record and undisputed facts, that there is no testimony or circumstance amounting to evidence in a legal sense, supporting a conclusion that the large animal encountered by the locomotive in charge of Miller and Gross at 11:45 p. m. was one of the several animals observed by the witness Reese as the latter passed this point between 4:39 and 4:45 p. m.; and hence

the holding and conclusion of the court that the failure of the defendant companies to drive out the cattle observed by Reese, or notify Miller and Gross of their presence upon the right-of-way, was the proximate cause of the derailment and the death of Miller and Gross is not supported by any legal evidence in this case, and that this Honorable Court, should so hold as matter of law. (Lee v. R'y Co., 89 Texas, 583; Choate v. R'y Co., 90 Texas, 88).

*Ninth Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the ninth assignment of error, urged by appellants, and presented on pages 142 and 143 of their brief on file, and embraced in paragraph eighth of the motion for rehearing, complaining that the trial court erred to the prejudice of defendants in rendering the judgment against them, and in its conclusions of fact and law found as a basis of said judgment, in this, that according to the undisputed evidence the deceased was a man of considerable knowledge and experience as a locomotive fireman, being
348 thoroughly familiar with the line of road over which he was operating the engine on this occasion, and being familiar with the method of fencing and maintaining gates along the right-of-way, and inclosing the track, having had opportunity and experience prior to such accident in observing and encountering animals upon the track, and within the enclosed right-of-way at such points as that at which this wreck occurred, and that, under the undisputed facts and according to the law applicable thereto, the deceased Corley Gross, had assumed the risk of the accident and injury, and neither of the defendants was liable therefor to the plaintiffs.

In this connection we especially refer to the statement of undisputed facts set forth on pages 143-151 of appellants' brief, which, according to our conception, bring the record of this case clearly within the decisions of our Texas courts. (Quill v. Ry. Co. (T. C. A.) 46 S. W., 847; Quill v. Ry. Co. (Sup. Ct.) 93 Texas, 616; Ry. Co. v. Somers, 71 Texas, 702; Green v. Cross, 79 Texas, 131.)

*Statement.*

The testimony in this case, we insist, showed conclusively the following facts: (1) That the gates placed in the right-of-way fences were so established by defendant for the use and benefit of the adjacent land owners and their tenants, were equipped with reasonably effective appliances, and that the adjacent land owners and their tenants were notified of and assumed the obligation to keep such gates closed; (2) that, notwithstanding the obligation assumed by the land owners and their tenants to keep such gates closed, they were often left open, and stock frequently entered through such gates onto the right-of-way and track; (3) that the facts and conditions above mentioned, in relation to these crossings and the trespassing of stock, were well and actually known to the engineers and firemen generally operating trains over said railroad, and were open to the observation

of Miller and Gross, and were actually known to them prior to the occurrence complained of.

The testimony supporting these conclusions we have set forth and quoted fully and in detail in the brief statement on pages 144-151 of appellants brief, with reference therein to the record, and showing the fact in that connection that Miller and Gross, during the
349 three months prior to this occurrence, had encountered and killed stock repeatedly at open crossings at and in the vicinity of this wreck.

*Authorities.*

Quill v. R'y Co. (Tex. Civ. App.), 46 S. W., 847.
Quill v. R'y Co. (Sup. Ct.) 93 Texas, 616.
R'y Co. v. Somers, 71 Texas, 702.
Green v. Cross, 79 Texas, 131.

*Tenth Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the tenth assignment of error, and the eleventh assignment of error, urged by appellants, and presented on pages 154-156 of appellants' brief on file, and embraced in paragraph ninth of the motion for rehearing, complaining that the trial court erred, to the prejudice of the defendant Texas & New Orleans Railroad Company, in admitting over its objections the printed rule No. 334, and printed rule No. 420, set forth in defendants' bills of exception No. 2, and No. 3, for the reason that said rules were irrelevant and immaterial to any issue in the case, so far as the Texas & New Orleans Railroad Company was concerned.

The Honorable Court virtually concedes that the rules here introduced in evidence were not relevant or material as fixing liability on the defendant Texas & New Orleans Railroad Company, there being no evidence whatsoever showing that they were promulgated or authorized by this company, they being embraced in a book of rules purporting to have been issued by the defendant Louisiana Western Railroad Company, and some other companies in Louisiana, but the name of the Texas & New Orleans Railroad Company being in no way represented or mentioned upon or in the book. However, the Honorable Court, disposes of these assignments by the suggestion that from the bills of exception it appears simply that the objection to the rules was that they were "irrelevant and immaterial to any issue in the case, as to either of the defendants." We insist that inasmuch as the same counsel were representing each of the two defendants, this was an appropriate method of objection, and that the Texas & New Orleans Railroad Company is entitled to avail itself of this objection in its behalf without regard to the fact that
350 evidence offered was relevant and material, as against its co-defendant, and that under the circumstances it became the duty of the court to restrict the evidence admitted and consider it only in relation to the liability of that company which was shown to

have promulgated and become responsible for the rules and regulations introduced.

*Statement.*

In connection with the recitals in the opinion of the Court of Civil Appeals, we respectfully refer here to the statement under our tenth assignment of error (on pages 155 and 156 of appellants' brief), and the statement under the eleventh assignment of error, (on page 157 of said brief), showing the rules which were here offered and introduced in evidence over the objection of each of the defendants, to the effect that they were irrelevant and immaterial, it appearing that they were rules issued and promulgated by the Louisiana Western Railroad Company alone, and not by the Texas & New Orleans Railroad Company, or under its authority or direction.

*Authorities and Remarks.*

In view of the conclusions of fact and law on which the trial court based his judgment against the Texas & New Orleans Railroad Company, as well as its co-defendant, he undoubtedly considered this rule as a substantial part of the evidence of negligence. For example: In the fourth paragraph of the conclusions of fact the court used the following language: "And I find that it was the duty of defendants and section men upon the section upon which the said cattle were, to have removed said cattle, or failing so to do, that it was the duty of defendants to notify said conductor and engineer of the presence of said cattle upon the right-of-way, and that they could have notified them, and in that case they and said Gross could have been upon the lookout for said cattle, and probably have avoided striking the one which they did," etc., "and I find that defendants were guilty of negligence in permitting the cattle to be and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, and in not giving the conductor and engineer of the train notice of their presence upon the right-of-way, and that such negligence was the proximate cause of the death of Gross." (Tr., p. 40.)

351 The regulations which were introduced and made the subject of this bill of exception No. 3 are referred to and covered by section fifth of the plaintiffs' petition. (Tr., pp. 7 and 8.)

We insist that the objection made, as shown in the bills of exception, by each of the defendants, who were represented by common counsel that the rules offered were irrelevant and immaterial, was sufficient for the purpose of reserving the exception of the defendant Texas & New Orleans Railroad Company, and that the Honorable Court of Civil Appeals erred in its conclusion to the contrary.

*Eleventh Ground of Error.*

The Honorable Court of Civil Appeals erred in its opinion and decision by refusing to sustain the twelfth assignment of error urged

by appellants, and presented on pages 158 and 159 of their brief on file, and embraced in paragraph tenth of the motion for rehearing, complaining that the trial court erred, to the prejudice of the defendant Texas & New Orleans Railroad Company, in rendering judgment against it jointly with its co-defendant, for the reasons: (1) That at the time of the wreck and injury of the said Corley Gross he was not engaged in performance of any service on behalf of the said defendant, Texas & New Orleans Railroad Company, nor was then and there an employé of the said defendant; (2) those servants or employés of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs, and made the basis of judgment herein, were not employés of the defendant, Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the principle of respondent superior; (3) that the rules and regulations relied upon in the pleading and introduced in evidence, and which are alleged to have been negligently violated, thus causing the injury and death of Gross, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

*Statement.*

The facts show, without dispute, that the deceased Corley Gross, at the time of his injury, was operating a locomotive within the State of Louisiana on the railroad owned and controlled by the Louisiana Western Railroad Company, and subject to the
352 orders and directions and control, at the time, of the officials and managers of the Louisiana Western Railroad Company, and that for such services as he was then performing he was to be compensated by the Louisiana Western Railroad Company, and that at the time of such injury he was not engaged in doing any service for the Texas & New Orleans Railroad Company, was beyond the limit of its railroad, was not being compensated for his particular service at that time by the Texas & New Orleans Railroad Company, and was in no sense under its direction, superintendence, or control, on this occasion.

The assistant superintendent, C. C. Mallard, (St. of Facts, pp. 33-37), E. E. Shackford (pp. 38-49), the section foreman, G. E. Bustin (pp. 54-59), the roadmaster, L. Lawler (pp. 60-63), and the plaintiffs' witness William Reese (St. of Facts, pp. 2-10), the fireman, who claims to have observed the stock at the point of derailment between 4 and 5 o'clock in the evening, all of them, were engaged on this occasion upon the railroad and in the service and employment and pay of the Louisiana Western Railroad Company, and none of them in the particular service performed by them at the time were working for or responsible to the Texas & New Orleans Railroad Company, nor does the record indicate or render it conceivable that any person who, on the occasion of this derailment, was engaged in the actual service and pay of the Texas

& New Orleans Railroad Company, and under its immediate direction, was in position to have prevented the derailment by removing the stock, or causing Miller to be warned.

Rules 334 and 420 introduced in evidence by plaintiffs, over the objections of the defendants, which manifestly entered into the consideration of the court in reaching its conclusions of actionable negligence in this case, were the rules promulgated by the Morgan's Louisiana and Texas Railroad and Steamship Company, and the Louisiana Western Railroad Company and not by the Texas & New Orleans Railroad Company; and there was not the slightest evidence, by recital or otherwise, indicating the promulgation of, or acquiescence in, the said rules and regulations by the Texas & New Orleans Railroad Company. (See Statement of Facts, pp. 21 and 22.)

353 It is also true that the statements in the testimony of various witnesses, giving their opinions or conclusions as to the duty of removing obstructions or giving warnings to train operatives, with regard to stock upon the right-of-way, had reference to the railroad of the Louisiana Western Railroad Company, as controlled and managed and operated by it, and had no reference to the Texas & New Orleans Company or its railroad. (See entire Statement of facts.)

*Authorities and Remarks.*

(1) The deceased Gross, having voluntarily entered and remained in the service of each of the defendants, the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, with the understanding that he was to serve alternately for the one and for the other on their respective lines of railroad, receiving his pay from each of them in turn for the particular service rendered for them respectively, and acting under the immediate direction, supervision and control of that company for which, during the given time he was working, the defendant Texas & New Orleans Railroad Company did not owe him any of the substantive duties ordinarily resting on the master toward the servant for the latter's safety in connection with the service rendered by him for the Louisiana Western Railroad Company on the latter's road, and while beyond the line of the Texas & New Orleans Railroad Company, and beyond the scope of its immediate direction, service and control. (T. & N. O. R. R. Co. v. Skinner (Tex. Civ. App.), 23 S. W., 1001; Ellsworth v. Metheney, 104 Fed. Rep., 119; Mitchell Transfer Co. v. Ehmet, 55 L. R. A., 710; Brown v. Byroads, 47 Ind. 435.)

(2) The section foreman, train operatives, and other employés of the Louisiana Western Railroad Company, whose negligence is complained of as a proximate cause of the injury and death, not being at the time engaged in the performance of any service for the Texas & New Orleans Railroad Company, or under its immediate direction, the latter company would not be liable for the results of such negligence on the principle of respondent superior. (Cunning-

ham v. R'y Co., 51 Texas, 503; Amer. & Eng. Enc. of Law, Vol. 20, pp. 181, 178 (2nd Ed.); Byrne v. Kansas City, Ft. Scott
354 R'y Co. et al., 61 Fed. Rep. 605; 9 C. C. A. 666; 24 L. R. A., 693; Powell v. Construction Co., 88 Tenn., 692; Hardy v. Dhedden Co., Ltd., 47 U. S. App., 362, 37 O. R. A., 42 et seq.)

*Twelfth Ground of Error.*

The Honorable Court of Civil Appeals erred in its decision and opinion by refusing to sustain the fifteenth assignment of error urged by appellants and presented on page 177 of their brief on file, and embraced in paragraph twelfth of the motion for rehearing, complaining that the trial court erred in rendering its judgment and decree herein in the aggregate sum of six thousand dollars, and that said sum is exorbitant and excessive, and beyond the amount which the plaintiffs are legally entitled to under the evidence, and that such judgment is the result of the Court applying the laws of Louisiana on the measure of damages, which laws in this respect were introduced in evidence over the objection of defendants, and that it was incompetent and against the policies of the courts of the State of Texas, and against the spirit of comity between two several States for this court to allow damages herein according to measures of damage existing in the State of Louisiana, but which are not recognized or permitted according to the laws of the State of Texas in such cases.

*Statement.*

The plaintiffs testified that Felix Gross aand Theresa Gross were the mother and father of Corley Gross, deceased; that Felix Gross, at the time of the trial, was sixty-five years old, and Theresa Gross was fifty-six years old; that Corley Gross, at the time of his death, was twenty-three years of age, was in good health, sober and industrious, and a dutiful son; that prior to his death he was earning an average of ninety dollars per month, the usual wages paid fireman for similar service; that at and prior to the time of his death he was residing with his parents in Harris County, Texas; that about two months after the death of Corley Gross his father sustained an injury of his wrist and ankle, which impaired his ability to labor; that Felix and Theresa Gross are without means of support other than that derived from their labor, and were dependent on their son, Corley Gross, for pecuniary aid. (St. of Facts, pp. 22 and 23.)

Judgment was rendered for plaintiffs in the aggregate sum
355 of six thousand dollars, three thousand dollars to each, for the death of Corley Gross. (Tr., p. 36.)

Upon the trial of the merits of this case the plaintiffs were permitted over the objections of defendants, to prove that, according to the laws of Louisiana which would be applicable to this case, the following would be proper elements of damage allowable for the death of Corley Gross to plaintiffs:

(1) The damage the decedent might have recovered had he lived, such as compensation for his pain and suffering,

for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, for the expenses of his illness.

(2) The loss by deprivation of the decedent's society and his aid and support, also the expenses of his death and burial.

(3) Recovery for mental suffering of the survivors. (See St. of Facts, pp. 102, 103, 104.)

In refusing to sustain the assignment presenting this point the Honorable Court of Civil Appeals, in its opinion, uses the following language:

"As hereinbefore mentioned, the Louisiana statute, in addition to the pecuniary loss sustained, allowed for the deprivation of the decedent's society and solace, expenses of his death, and also for mental suffering of the survivors. The point made is that our courts cannot or should not allow for such elements of damage as our legislature has seen fit not to provide for them in our statute. This right of action arose, not under our statute, but under that of Louisiana, which fixes both the right and the extent thereof. There exists no insuperable, or even inconvenient, difficulty, in arriving at the damages as allowed by the Louisiana statute, or in enforcing the judgment substantially in form and substance as would be done in that State. The right to recover damages existing, it would seem to be wholly immaterial whether the cause of action arises at common law or by statutes, especially so when the law of the forum recognizes and gives a similar right of action for the same cause. We can see no sound reason for recognizing the foreign statute, so far as it accords with what our statute allows in such cases, and refusing to give it any further enforcement on account of our statute which has nothing to do with
356 the cause of action. The courts of this State should, in such cases, on principles of comity, hear and determine the right, as it exists, and enforce it in its entirety, or not at all."

We respectfully submit that the reasoning of the Honorable Court of Civil Appeals in the language above quoted is not in conformity, upon principle, with the decisions of this State in cases adjudicated by our Texas courts on the basis of comity. But if it were true, as maintained by the Court of Civil Appeals, that principles of comity would permit our courts to award damages in this case for the deprivation of decedent's society and his aid and support, and the expenses of his death and burial, as well as recovery for mental suffering of the survivors, none of which would be allowable under our Texas statute, yet the reasoning of the court would still not justify the allowance to the survivors of those damages which the decedent himself might have recovered had he lived (such as compensation for his pain and suffering, for his loss of wages or earnings during the time intervening between the accident and his death, for his disfigurement, and for the expenses of his illness), which he was entitled to under the Louisiana act, even before and without regard to the amendment of 1884, but which it has been expressly held by the Supreme Court of Texas they could not recover or maintain an

action for in the courts of this State. (R'y Co. v. Richards, 68 Texas, 378.)

*Conclusion.*

Wherefore, plaintiffs in error pray for writ of error to the Honorable Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, and for citation as provided by law, and upon hearing of this application the judgment of the District Court of Harris County and of the Honorable Court of Civil Appeals be reversed, and for such other relief as petitioners may be entitled to.

Respectfully submitted.

BAKER, BOTTS, PARKER & GARWOOD,
A. L. JACKSON,
*Attorneys for Plaintiffs in Error, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company.*

357 *Copy of Judgment in Supreme Court of Texas.*

T. & N. O. R. R. Co. et al.
vs.
FELIX GROSS et al.

From Harris County, 4th District.

OCTOBER 26TH, 1910.

This day came on to be heard the application of T. & N. O. R. R. Co., et al., for a writ of error to the Court of Civil Appeals for the Fourth District, and the same having been duly considered, it is ordered that said application be refused. That the applicants Texas & New Orleans Railroad Company and Louisiana Western Railroad Company and their surety United States Fidelity and Guaranty Company pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 11th day of November, A. D. 1910.

[SEAL.]

F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

Motion for rehearing overruled Nov. 9, 1910.

Endorsed: Application No. 6896. T. & N. O. R. R. Co. et al., vs. Felix Gross et al. Copy of Judgment in Supreme Court. Application for writ of error refused. Filed in the Court of Civil Appeals at San Antonio, Texas, Nov. 12, 1910. Jos. Murray, Clerk.

358 *Petition for Writ of Error.*

In the Supreme Court of the United States.

No. —.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs in Error,
vs.
FELIX & THERESA GROSS, Defendants in Error.

To the Honorable J. H. James, Chief Justice of the Court of Civil Appeals of Texas, Fourth Supreme Judicial District:

Your petitioners, Texas & New Orleans Railroad Company and Louisiana Western Railroad Company and the United States Fidelity and Guaranty Company, respectfully show that in the above entitled cause then pending in the Court of Civil Appeals for the Fourth Supreme Judicial District on appeal from the District Court of Harris County, Texas, in and for the Eleventh Judicial District of Texas, wherein petitioners, Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, were the only parties appellant and petitioner the United States Fidelity and Guaranty Company, a corporation, was the surety on the appeal bond of the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, and Felix Gross and Theresa Gross were the only appellees, the said Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas on the 4th day of May, 1910, affirmed the judgment and decree in said cause theretofore rendered therein on the 30th day of January, 1909, by the District Court of Harris County, Texas, in and for the Eleventh Judicial District of Texas, in favor of the said Felix Gross and Theresa Gross, as plaintiffs, apportioned equally between them, and against petitioners, the Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, jointly and severally,
359 for the sum of Six Thousand Dollars, with interest thereon from the date of such judgment at the rate of six per cent. per annum and costs of suit; and the said Court of Civil Appeals in affirming said judgment entered its order and decree for the amount thereof, principal, interest, and costs, in favor of the said Felix Gross and Theresa Gross, against petitioners, the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, and their surety, the United States Fidelity & Guaranty Company.

That thereafter and in due time, on the 13th day of May, 1910, petitioners, the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, filed in said Court of Civil Appeals their motion for rehearing, which motion thereafter on the 25th day of May, 1910, was overruled and denied by said Court of Civil Appeals.

That thereafter and in due time, to-wit: on the 23rd day of June,

A. D., 1910, petitioners Texas & New Orleans Railroad Company and Louisiana Western Railroad Company applied, in due form and as authorized by law, to the Supreme Court of the State of Texas for Writ of Error in said cause to the said Court of Civil Appeals, which application on the 26th day of October, A. D. 1910, was denied by the said Supreme Court of Texas and the writ of error prayed for was refused.

That thereafter on the 2nd day of November, A. D., 1910, petitioners Texas & New Orleans Railroad Company and Louisiana Western Railroad Company filed in and presented to the Supreme Court of Texas their motion for rehearing on said application, which motion on the 9th day of November, 1910, was overruled and refused by the Supreme Court of Texas, when and whereupon said judgment and decision theretofore rendered in the Court of Civil Appeals, which is the highest court of law or equity in the said State of Texas in which a decision in said suit could be had, became and is final.

360 Petitioners say that they are aggrieved by said judgment and the proceedings in said suit and that in said judgment and proceedings had prior thereunto in said cause manifest errors were committed, to the prejudice of petitioners, and each of them, because they say that in said suit rights, title, privileges, and immunities were and are claimed by petitioners under the Constitution and laws of the United States, and the decision and judgment in said suit was against the title, rights, privileges and immunities specially set up and claimed by petitioners under said Constitution and statutes, as will more fully appear from the record of said cause and as shown especially by the defendants' pleadings, which set up Section 17 of the legislative act of Louisiana incorporating the Louisiana Western Railroad Company in bar of this action, and by reference to evidence set forth in the record, proving the said section so plead, and by objections to the introduction in evidence of the certain statute or amendment enacted by the State of Louisiana in 1884, purporting to create the right of action upon which this action was brought, such objections being evidenced by bills of exception in the record and by the First Assignment of Error, the Fifth Assignment of Error, the Third Assignment of Error, and the Fourth Assignment of Error, set forth and urged in appellants' brief in and before the said Court of Civil Appeals, and by the First, Fourth and Fifth Grounds of the appellants' petition and application for writ of error addressed to the Supreme Court of Texas, and the First, Fourth and Fifth Grounds of the motion for rehearing of plaintiffs in error before the Supreme Court of Texas, and by the assignments of error now filed herein and in connection with and as part hereof; all of which documents and records petitioners pray your Honors to read and consider as parts hereof.

Your petitioners claim the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States, because: (1) under

361 Section I, Article IV, of the Constitution of the United States and Section 906 of the United States Compiled Statutes of 1901, page 677, petitioners, and each of them, have a title,

right, privilege and immunity for and to the end that full faith and credit should and shall be given in the State of Texas and by the courts thereof to the public acts, records, and judicial proceedings of the State of Louisiana, including (*a*) that certain provision made in Section 17 of the legislative Act of the State of Louisiana passed and enacted by the legislature of the State of Louisiana and duly approved by said state March 30th, 1878, known as Act No. 21, of 1878, creating the corporation of petitioner Louisiana Western Railroad Company, and exempting petitioner the Louisiana Western Railroad Company, from the claim and liability sought and adjudged against petitioners, jointly, in this cause, (*b*) and that provision of the legislative act of the State of Louisiana known as Article 2315 of the Civil Code and the amendment thereof enacted in 1884 by the legislature of the State of Louisiana, creating the right of action in said state for injuries resulting in death, which provision terminates and extinguishes such right of action at the expiration of one year from and after the death, if suit is not brought thereon during such period of one year; and (2) under Section 10, Article I, of the Constitution of the United States petitioners, and each of them, have and had a title, right, privilege, and immunity from and against the impairment of the obligation of the Louisiana Western Railroad Company's charter contract with the State of Louisiana, wherein, by virtue of Section 17 of the incorporating legislative act aforesaid, it is exempt and immune from liability for and on account of the alleged losses and damages and occurrences involved in this cause and which have been claimed and adjudged against petitioners herein on the basis and authority of a right of action first created and existing in the State of Louisiana by the legislative act of said state passed and enacted and approved during the year 1884 and not existing prior thereto; and that
362 the courts of the State of Texas, by the decision and judgment herein complained of, decided against such titles, rights, privileges, and immunities which were specially set up and claimed by petitioners, as fully appears by the record of proceedings in said cause and which is herewith submitted.

Wherefore your petitioners pray the allowance of a writ of error, returnable into the Supreme Court of the United States, and for citation and supersedeas; and so your petitioners will ever pray, etc.

TEXAS & NEW ORLEANS RAILROAD COMPANY.
LOUISIANA WESTERN RAILROAD COMPANY.
UNITED STATES FIDELITY AND GUARANTY COMPANY. *Petitioners.*
JAMES A. BAKER, JR.
EDWIN B. PARKER.
H. M. GARWOOD
A. L. JACKSON. *Attorneys for Petitioners.*

BAKER, BOTTS, PARKER & GARWOOD.
*Of Counsel.*

Let the writ of error issue as above prayed for, upon the execution of bond in the sum of Sixteen Thousand Dollars, such bond when approved to act as a supersedeas.

JOHN H. JAMES,
*Chief Justice Court of Civil Appeals of Texas,*
*Fourth Supreme Judicial District.*

Endorsed: In the Supreme Court of the United States. No. —. Texas & New Orleans Railroad Company et al., Plaintiffs in Error, vs. Felix & Theresa Gross, Defendants in Error. Petition for Writ of Error. In the Supreme Court of the United States. Filed in the Court of Civil Appeals at San Antonio, Texas, Nov. 17, 1910. Jos. Murray, Clerk.

363 *Writ of Error Bond.*

In the Supreme Court of the United States.

No. —.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs in Error,
vs.
FELIX & THERESA GROSS, Defendants in Error.

Know all men by these presents, That we, the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, and the United States Fidelity and Guaranty Company, as principals, and W. B. Chew and C. G. Pillot as sureties, are held and firmly bound unto Felix Gross and Theresa Gross in the sum of Sixteen Thousand ($16,000.00) Dollars, to be paid to them, the said Felix Gross and Theresa Gross, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this the 12th day of November, A. D., 1910.

Whereas the above named plaintiffs in error have prosecuted a writ of error in the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

Now therefore, the condition of this obligation is such, that if the above named plaintiffs in error shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

364 Witness our hands this the 12th day of November, A. D. 1910.

TEXAS & NEW ORLEANS RAILROAD COMPANY,
LOUISIANA WESTERN RAILWAY COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD, *Attorneys,*
UNITED STATES FIDELITY & GUARANTY CO.,
By EDWARD R. LEWIS,
*Manager Texas-Louisiana Dept.,*
***Principals.***

W. B. CHEW,
C. G. PILLOT, *Sureties.*

THE STATE OF TEXAS,
*County of Harris:*

Personally appeared before the undersigned authority W. B. Chew and C. G. Pillot, whose names are subscribed, as sureties, to the above and foregoing bond and each of them, having been duly sworn, stated upon his oath that he is worth at least the sum of Sixteen Thousand ($16,000.00) Dollars over and above all of h exemptions and liabilities.

W. B. CHEW.
C. G. PILLOT.

Sworn to and subscribed before me this the 15th day of November, A. D., 1910.

[SEAL.]

M. E. SISSON,
*Notary Public, Harris County, Texas.*

If the foregoing bond were presented to me for approval I would approve the same.

[SEAL.]

C. DART,
*Clerk United States Circuit Court,*
*Southern District of Texas,*
By L. C. MASTERSON, *Deputy.*

365 I hereby approve the foregoing bond and the Sureties thereon this the 17th day of November, 1910.

JOHN H. JAMES,
*Chief Justice of the Court of Civil Appeals for the 4th Supreme Judicial District of Texas.*

Endorsed: In the Supreme Court of the United States. No. —. Texas & New Orleans Railroad Company et al., Plaintiffs in Error. vs. Felix & Theresa Gross, Defendants in Error. Writ of Error Bond. Filed in the Court of Civil Appeals at San Antonio, Texas. Nov. 17, 1910. Jos. Murray, Clerk.

366 *Certificate of Lodgment.*

I, Jos. Murray, Clerk of the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, do hereby certify that there was lodged with me as such clerk on November 17th, A. D., 1910, in the matter of The Texas & New Orleans Railroad Company, et al., Plaintiffs in Error, versus Felix Gross and Theresa Gross, Defendants in Error.

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in San Antonio, Texas, this 5th day of December, A. D., 1910.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
*Clerk Court Civil Appeals in and for Fourth Supreme Judicial District of Texas.*

367 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the suit between the Texas & New Orleans Railroad Company, the Louisiana Western Railroad Company, the United States Fidelity and Guaranty Company, on the one hand, and Felix Gross and Theresa Gross, on the other hand, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Texas & New Orleans Railroad Company and Louisiana Western Railroad Company, and their surety, the United States Fidelity and Guaranty Company, as by their complaint appears. We being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme
368 Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Associate Justice of the United States, the 17th day of November, in the year of our Lord one thousand nine hundred and ten.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, San Antonio.]

D. H. HART,
*Clerk Circuit Court United States,*
*Western District of Texas,*
By A. J. CAMPBELL, *Deputy.*

Allowed.
JOHN H. JAMES,
*Chief Justice Court of Civil Appeals, Fourth Supreme Judicial District of Texas.*

UNITED STATES OF AMERICA,
*Court Civil Appeals of Texas, Fourth District:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Court of Civil Appeals Fourth Supreme Judicial District of Texas, in the City of San Antonio this Dec'r 9th, 1910.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
*Clerk Court Civil Appeals, Fourth Dist. of Texas.*

368½ [Endorsed:] 12. In the Supreme Court of the United States. No. —. Texas & New Orleans Railroad Company et al., Plaintiffs in Error, vs. Felix and Theresa Gross, Defendants in Error. Writ of Error. Filed in the Court of Civil Appeals at San Antonio, Texas, Nov. 17, 1910. Jos. Murray, clerk.

369 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Felix Gross and Theresa Gross, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Civil Appeals, Fourth Supreme Judicial District of Texas, wherein the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company and their surety, the United States Fidelity and Guaranty Company, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Court of Civil Appeals of the State of Texas, for the Fourth Supreme Judicial District, this the 17" day of Nov'r, 1910.

JOHN H. JAMES,
*Chief Justice Court of Civil Appeals of Texas for the Fourth Supreme Judicial District of Texas.*

[Seal Court of Civil Appeals of the State of Texas.]

Attest:
JOS. MURRAY,
*Clerk Court of Civil Appeals, Fourth Supreme Judicial District of Texas.*

I, John W. Parker, attorney of record for defendants in error, Felix Gross and Theresa Gross, in the above entitled cause hereby acknowledge due service of the above and foregoing citation, by delivery of a copy thereof to me on this day, and hereby enter an appearance in the Supreme Court of the United States.

Witness my hand this the 18th day of November, A. D. 1910.

JOHN W. PARKER,
*Attorney for Felix Gross and Theresa Gross, Defendants in Error.*

369½ [Endorsed:] In the Supreme Court of the United States. No. —. Texas & New Orleans Railroad Company et al., Plaintiffs in Error, vs. Felix and Theresa Gross, Defendants in Error. Citation. Issued Nov. 17", 1910. Jos. Murray, clerk. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 19, 1910. Jos. Murray, Clerk.

370 *Assignment of Errors.*

In the Supreme Court of the United States.

No. —.

TEXAS & NEW ORLEANS RAILROAD COMPANY et al., Plaintiffs in Error,
vs.
FELIX and THERESA GROSS, Defendants in Error.

Now come the plaintiffs in error in the above mentioned cause and respectfully submit that in the record, proceedings, decisions and final judgment in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas there is manifest error, in this:

**1.**

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court should have sustained the pleas to the jurisdiction and in abatement of each of the defendants, the Louisiana Western Railroad Company and the Texas & New Orleans Railroad Company, and by holding in this connection (1) that the right of action for injuries resulting in death in the State of Louisiana created by statute in that state was transitory and enforcible in the courts of Texas; (2) that the conflict and inconsistency between the laws of Louisiana and Texas as to the measure of damages and extent of recovery awarded for injuries resulting in death was not such as precluded the Texas courts from taking cognizance of the cause and enforcing the laws of Louisiana applicable thereto; (3) that the conflict between the laws of Texas and of Louisiana on the doctrine of fellow-servants, as a defense, was not such as to preclude the courts of Texas from taking cognizance of the cause and administering the laws of Louisiana applicable thereto; and (4) that Section 17 of the act of March 30, 1878,
371 of the State of Louisiana incorporating the Louisiana Western Railroad Company and granting immunity from liability such as is sought to be fixed on the defendants in this case presents no such defense as should preclude the courts of Texas, on grounds of comity, from taking cognizance of this cause and administering the laws of Louisiana applicable thereto; and (5) that in connection with its holding last above mentioned said court by its action undertook to pass upon and construe said charter provision, holding against its validity, and thereby refused to give full faith and credit to the public act of the state of Louisiana, thus depriving plaintiffs in error of privileges, rights, and immunities to which they were entitled under the Constitution and statutes of the United States, as set forth and provided in Section I, Article IV, of the said Constitution, and Section 906 of the United States Compiled Statutes of 1901, page 677.

2.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before the said Court of Civil Appeals, to the effect that under and by virtue of Section 17 of the Act of the Legislature of Louisiana of 1878, incorporating the Louisiana Western Railroad Company, the said corporation was and is exempted from legal liability for the alleged injuries resulting in the death of Corley Gross and such immunity and exemption from liability was a matter of contract between the State of Louisiana and said corporation and a vested right in it affecting all parties thereafter dealing with said corporation in the attitude of employé; that under the undisputed testimony and the authorities established before the trial court and appearing in the record Section 17 of the incorporating act was a valid and subsisting public act of the State of Louisiana and a valid and binding contract obligation between said state and the Louisiana Western Railroad Company, and that the judgment of the trial court in refusing to entertain the plea and approve said immunity provision as a
372 bar to the action, and in entering the judgment against plaintiffs in error deprived them of rights, privileges and immunities which they were entitled to under the Constitution and statutes of the United States of America, in these particulars, to-wit: (1) that the said court thereby failed and declined to give full faith and credit to the public legislative act of the State of Louisiana, as provided in Section I, Article IV, of the Constitution of the United States and Section 906 of the United States Compiled Statutes of 1901, page 677, and (2) that the act of the Legislature of the State of Louisiana of the year 1884, amending Article 2315 of the Civil Code of said State, so as to create and bring into existence for the first time in Louisiana the right of action asserted by plaintiffs and by authority of which the trial court rendered judgment against plaintiffs in error, as defendants below, would and did have the effect of impairing the obligation of petitioners' charter contract existing under said Section 17 of the incorporating act, and thus would and did violate Section 10, (X), Article I, of the Constitution of the United States.

3.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignments urged and presented before said Court of Civil Appeals, to the effect that the trial court should have excluded from the evidence, upon the objection of the defendants below, that certain testimony proving the legislative act of 1884 of the State of Louisiana, creating therein a right of action for injuries resulting in death such as that involved in this case, the objections urged to said evidence being as follows, to-wit: (1) that the evidence offered and introduced was not admissible or relevant under the plaintiffs' pleadings; (2) that the elements of dam-

age allowed in Louisiana in a recovery by virtue of the statu-
373 tory right of action in that state under said legislative act were not allowed under the laws of Texas in similar cases and could not afford a basis of recovery in the Texas courts in such cases, and were therefore irrelevant and immaterial; and (3) that Section 17 of the Act of 1878, of the State of Louisiana, incorporating the Louisiana Western Railroad Company, was plead and proven without dispute, as a bar to the action, and the failure to recognize it as such, on the part of the Texas courts, would and did involve (*a*) a refusal to give full faith and credit to the public act of the State of Louisiana, thus violating Section 1, Article IV, of the United States Constitution, and (*b*) that the Louisiana Statute of 1884 here offered and introduced in evidence over the objections of defendants, if applied to the Louisiana Western Railroad Company, would and by such application did impair the obligation of its said charter contract, embraced in Section 17 of the incorporating act, and thus infringe Section 10, Article I, of the United States Constitution.

**4.**

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error, and refusing to sustain the assignments of plaintiffs in error, to the effect that the trial court should have sustained the special demurrers of plaintiffs in error, who were defendants below, and their special pleas of departure in pleading, and setting up the statute of limitations, showing that the plaintiffs' first amended original petition filed in this cause May 19, 1908, alleged for the first time within the history of the litigation "that by the statute law of the state of Louisiana they are given a right of action against defendants, and each of them, for the damage sustained by them (plaintiffs) by the death of their said son, caused by their negligence as aforesaid, which statute is similar to the statute of this state giving parents a right of action for damages for the death of their son as result of negligence"; that such allegation, and the cause of action (if any) based
374 thereon, constituted a departure in the pleading from fact to fact and from law to law, thus asserted for the first time, and the alleged injury having occurred June 1st, 1905, said action was barred by the statute of limitation of the State of Texas of two years, and by the rule and law of prescription of one year of the State of Louisiana, which were duly plead, by way of exception and plea in bar by defendants, and each of them, in bar of said action, and said action was also terminated, extinguished and prescribed by the provision and language itself of the act and amendment of 1884 of the legislature of the State of Louisiana, creating the right of action, by the lapse and expiration of one year between the date of the death and the filing and institution of the suit; and that by holding, in this connection, that the right of action given to plaintiffs for the death of C. Gross, though not declared or sued upon within one year from such death, as provided by the language of the act itself, nevertheless was available to plaintiffs as a legal basis of judgment, the Honorable Court of Civil Appeals failed to give full faith and credit

to said restrictive proviso of the amended act of 1884, which proviso limiting and terminating the right given on the condition mentioned was and is itself a public act of the State of Louisiana, and thus infringed Section I, Art. IV of the Constitution of the United States.

5.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred in its judgment and decree against them and in its conclusions of fact and law filed in connection with and support of said decree, to the effect that the two defendants were partners and were jointly liable, the facts in this case and the relations in this connection between the Texas & New Orleans Railroad Company and the Louisiana Western Railroad Company, being somewhat similar to, but not so strongly indicating partnership as, the facts recited in the opinion of
375 the Supreme Court in its decision of the case of Peterson v. Chicago, Rock Island & Gulf R. R. Co., 205 U. S., 51 L. Ed. 851.

6.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred especially to the prejudice of the defendant Texas & New Orleans Railroad Company in admitting, over its objections, certain printed rules set forth in the bills of exception Nos. 2 and 3, on the record, for the reason that said rules were irrelevant and immaterial to any issue in the case, so far as the defendant Texas & New Orleans Railroad Company was concerned, the said rules and regulations having been issued and promulgated entirely under the authority and in the name of the Louisiana Western Railroad Company alone, and the proof showing, without dispute, that the Texas & New Orleans Railroad Company had nothing to do with the promulgation of said rules and that the injury and death in question occurred in Louisiana, beyond the line of the Texas & New Orleans Railroad Company, and that the train operated by the deceased engineer and fireman was not at the time being operated by the defendant Texas & New Orleans Railroad Company, or over any railroad line owned or controlled by it.

7.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred to the prejudice of the defendant Texas & New Orleans Railroad Company in rendering judgment against it jointly with its co-defendant, for the reasons: (1) that at the time of the wreck and injury of the said Corley Gross he was not engaged in performance of any service

on behalf of the said defendant, Texas & New Orleans Rail-
376 road Company, nor as then and there an employé of the said defendant; (2) those servants or employés of the Louisiana Western Railroad Company whose alleged negligence is complained of by plaintiffs and made the basis of judgment herein, were not employés of the defendant Texas & New Orleans Railroad Company, for whose acts the latter company was or could be held legally liable on the principle of respondeat superior; (3) that the rules and regulations relied upon in the pleading and introduced in evidence, and which are alleged to have been negligently violated, thus causing the injury and death of Gross, are not shown by any evidence to have had any relation to the service or train movements of the defendant Texas & New Orleans Railroad Company, or to have been authorized or promulgated by the said defendant.

**8.**

Said Court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred in its judgment against the plaintiffs in error, defendants below, and in its conclusions of fact and law upon which said judgment was based, and especially that portion of its said conclusions of fact and law being paragraph numbered 4 thereof, reading as follows, to-wit:

"I find that some hours previous to the derailment of Gross' locomotive, that another of defendants' trains had struck and killed an animal of the cow species near the place of the derailment; and the carcass was allowed to lie upon the right-of-way, within a short distance of a gate in the right-of-way fence, and that several hours prior to the derailment a number of cattle entered the right-of-way through the said gate, and were seen by employés of defendants, in charge of one of the defendants' east-bound trains, gathered about the dead one, holding a 'ceremony' as expressed by one of the witnesses; that the said cattle were probably attracted upon the right-of-way
377 by the dead one; and find that defendants knew, or would have known by the exercise of ordinary care, of the presence of the dead animal upon the right-of-way, and knew, or would have known by the exercise of such care, that if the gate was open that cattle would probably be attracted therein by the dead one, or would enter therein of their own volition, and knew of the presence of the cattle which were gathered about the dead one in time to have notified the conductor and engineer of the train of that fact, and in time to have had the said cattle removed from the right-of-way, and I find that it was the duty of defendants and the section men upon the section upon which the said cattle were, to have removed said cattle, or failing so to do to notify said conductor and engineer of the presence of said cattle upon the right of way, and that they could have notified them, and in that case they and said Gross could have been upon the lookout for said cattle, and probably have avoided striking the one which they did, or have so slackened the speed of the train as to have pre-

vented a derailment thereof; and I find that defendants were guilty of negligence in permitting the cattle to be, and remain upon the right-of-way, under the circumstances, and in failing to remove them from the right-of-way before the accident, or in not giving the conductor and engineer of the train notice of their presence upon the right-of-way, and that such negligence was the proximate cause of the death of Gross."

And in this connection we especially urge and insist that in order to sustain the judgment on the conclusion of fact found by the court in the fourth paragraph thereof, to the effect that the defendants were guilty of negligence in failing to remove from the right-of-way enclosure the cattle which were observed by their employé Reese, inside of the fence, or to notify the deceased of the presence of said cattle upon the right-of-way, and within such inclosure, it was necessary to show by some legal evidence the identity of the animal thereafter encountered by Miller's locomotive and
378 causing the derailment, as one of the animals theretofore observed by Reese, and there being no evidence in this case tending to show such identity, there is no causal relation shown in the record between the negligence found by the court, in his conclusions, and the injury complained of, to support the judgment.

9.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, complaining that the trial court erred to the prejudice of defendants below in rendering judgment against them, and in its conclusions of fact and law found as a basis of said judgment, in this, that according to the undisputed evidence the deceased was a man of considerable knowledge and experience as a locomotive fireman, being thoroughly familiar with the line of road over which he was operating the engine on this occasion, and with the method of fencing and maintaining gates along the right of way and inclosing the track, having had opportunity and experience prior to such accident in observing and encountering animals upon the track, and within the inclosed right of way at such points as that at which this wreck occurred, and that under the undisputed facts and according to the law applicable thereto the deceased fireman had assumed the risk of the accident and injury and neither of the railroad companies was liable therefor to the plaintiffs.

10.

Said court erred in its decision and judgment by affirming the judgment of the trial court against plaintiffs in error and refusing to sustain the assignment urged and presented before said Court of Civil Appeals, to the effect that the trial court erred in rendering its judgment and decree in the aggregate sum of $6000.00, said
379 amount being exorbitant and excessive and beyond the amount which the plaintiffs were entitled to (if any) under the evidence, and that the judgment in such amount resulted from

the act of the trial court in applying the law of Louisiana on the measure of damage, which laws in this respect were introduced in evidence over the objection of defendants, and it was incompetent and against the policies of the courts of the State of Texas, and against the spirit of comity between the two several states, for this court to allow damages herein according to measures of damage existing in the State of Louisiana, but which are not recognized or permitted according to the laws of the State of Texas.

Wherefore, because of the errors assigned, plaintiffs in error pray that the judgment and decision of the said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas be set aside and reversed.

JAMES A. BAKER, JR.,
EDWIN B. PARKER,
H. M. GARWOOD, &
A. L. JACKSON,
*Attorneys for Plaintiffs in Error.*

Endorsed: In the Supreme Court of the United States. No. —. Texas & New Orleans Railroad Company et al., Plaintiffs in Error, vs. Felix & Theresa Gross, Defendants in Error. Assignment of Errors. Filed in the Court of Civil Appeals, at San Antonio, Texas, Nov. 17, 1910. Jos. Murray, Clerk.

380 *Cost Bill in Court of Civil Appeals, San Antonio, Texas.*

No. 4411.

T. & N. O. R. R. Co., Appellant,
vs.
FELIX GROSS et al., Appellees.

From Harris County, Texas.

T. & N. O. R. R. Co., Principals.
United States Fidelity & Guaranty Company, Surety.
Record Filed April 21, 1909; Disposed of May 25, 1910.
How Decided—Affirmed. Opinion by James, C. J.

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|---|---|
| Filing Record | $.50 |
| Docketing Cause | .50 |
| Appearances | 1.00 |
| Fling Briefs and other Papers | 3.90 |
| Notices | 6.00 |
| Orders | 2.00 |
| Judgment | 1.00 |
| Recording Opinion | 6.15 |
| Certificate with Seal | .50 |
| Taxing Cost | .50 |
| Certified Copy Bill of Costs | 1.00 |
| Mandate | 1.50 |
| Filing and Docketing Motion | .35 |
| Precept | 3.00 |

| | |
|---|---|
| Making Certified Copy of Motion | 27.00 |
| Sheriff's Fees | 2.25 |
| Transcript to Supreme Court United States and certificates. | 191.00 |
| Clerk U. S. Circuit Court issuing writs | 2.00 |
| Issuing Citation | 1.00 |
| Costs in Court of Civil Appeals at Galveston | 7.25 |
| Transcript to Supreme Court | 1.50 |
| Express charges to and from Supreme Court | .60 |
| Costs in Supreme Court | 8.05 |
| Total | 268.55 |
| Dec. 7, 1910, by cash | 74.05 |
| Balance due | $194.50 |

THE STATE OF TEXAS:

381 I, Jos. Murray, Clerk of the Court of Civil Appeals of Texas, at San Antonio, hereby certify that the above and foregoing Bill of Costs, for the sum of One hundred ninety four and 50/100 is true and correct.

Given under my hand and seal of office this 9th day of December, 1910.

[SEAL.] JOS. MURRAY, *Clerk.*

382 *Authentication of Record.*

I, Joe Murray, Clerk Court of Civil Appeals, in and for the Fourth Supreme Judicial District of Texas, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Texas & New Orleans Railroad Company, appellant vs. Felix & Theresa Gross, Appellees, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in San Antonio, Texas, this December 5th, 1910.

[Seal Court of Civil Appeals of the State of Texas.]

JOS. MURRAY,
*Clerk Court Civil Appeals, Fourth Supreme Judicial District of Texas.*

[Endorsed:] No. 4411. In Court of Civil Appeals, Fourth Supreme Judicial District of Texas, San Antonio. Texas & New Orleans R. R. Co. et al., vs. Felix Gross & Theresa Gross. Transcript to Supreme Court of the United States. Jos. Murray, Clerk.

Endorsed on cover: File No. 22,453. Texas court of civil appeals, fourth supreme judicial district. Term No. 832. Texas & New Orleans Railroad Company and Louisiana Western Railroad Company and their surety, The United States Fidelity & Guaranty Company, plaintiffs in error, vs. Felix Gross and Theresa Gross. Filed December 27th, 1910. File No. 22,453.

[redacted]

No. 3355

[redacted]

In the

# Supreme Court of the United States

October Term, 1910.

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TEXAS & NEW ORLEANS RAILROAD COMPANY AND LOUISIANA WESTERN RAILROAD COMPANY AND THEIR SURETY, THE UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiffs in Error*,

vs.

FELIX GROSS AND THERESA GROSS, *Defendants in Error*.

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In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas

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## BRIEF AND ARGUMENT

On Motion to Dismiss Writ of Error or to Affirm Judgment.

—BY—

J. W. PARKER,

*Attorney.*

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Gray, Dugger & Co., Printers, 110 Main St., Houston, Texas.

In the

# Supreme Court of the United States

October Term, 1910.

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TEXAS & NEW ORLEANS RAILROAD COMPANY AND LOUISIANA WESTERN RAILROAD COMPANY AND THEIR SURETY, THE UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiffs in Error*,

*versus* } No. 832.

FELIX GROSS AND THERESA GROSS, *Defendants in Error*.

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**In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas**

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Come now the defendants in error herein, by their counsel appearing in that behalf, and move the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree to which the said writ was allowed is the judgment or decree of th e Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas, being the highest court of law or equity of the State in which a decision could be had in said cause.

And the said defendants in error, by counsel as aforesaid, also move the court to affirm the said judgment or

decree, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that the said writ of error was sued out for delay only.

*Counsel for Defendants in Error for the purposes of these motions.*

In the

# Supreme Court of the United States

October Term, 1910.

---

TEXAS & NEW ORLEANS RAILROAD COMPANY AND LOUISIANA WESTERN RAILROAD COMPANY AND THEIR SURETY, THE UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiffs in Error*,

*versus* { No. 832.

FELIX GROSS AND THERESA GROSS, *Defendants in Error*.

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**In Error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.**

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## BRIEF AND ARGUMENT ON MOTIONS TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT.

This is a companion case to same plaintiffs in error against Fannie Miller et al., No. 831, and presents the same Federal questions, and defendants in error respectfully ask that the two records be considered together, and they refer to their Brief and Argument on the motion to dismiss the writ of error or to affirm the judgment in the Miller case, and ask that the same be considered as their brief and argument on the motions in this case.

The deceased, for whose death the Miller suit was brought, was the engineer, and the deceased, for whose death this suit was brought, was the fireman, and each received the injuries which caused his death in the derailment of the engine.

The defendants in error dismissed their suit as against the Southern Pacific Company. (Rec., 23.)

*Attorney for Defendants in Error,*
*Felix and Theresa Gross.*

[redacted]

OCTOBER TERM, 1915.

No. 906.

TEXAS & NEW ORLEANS RAILROAD COMPANY ET AL.,
*Plaintiffs in Error*,

vs.

FELIX GRESS and TERESSA GRESS,
*Defendants in Error*.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE [redacted] SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

# BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.


MAXWELL EVARTS,
H. M. GARWOOD,
A. L. JACKSON,
*Of Counsel for Plaintiffs in Error.*



[redacted]

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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No. 832.

TEXAS & NEW ORLEANS RAILROAD COMPANY AND LOUISIANA WESTERN RAILROAD COMPANY and their Surety THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Plaintiffs in Error,

VERSUS

FELIX GROSS and THERESA GROSS.

Defendants in Error.

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IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

## BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

### Statement.

As indicated by counsel for defendants in error in their brief supporting the motion to dismiss

or affirm, this is a companion case with that of the same plaintiffs in error vs. Fannie Miller *et al.*, No. 831, on the docket of this Court, and involves substantially the same federal questions as the Miller case, such questions being raised and decided substantially in the same manner and by similar proceedings in the two cases except on one of the points which we shall hereinafter call attention to.

This case involves an action at law brought in the State District Court of Harris County, Texas, by the defendants in error, Felix Gross and Theresa Gross, surviving parents of the deceased, Corley Gross, against plaintiffs in error, the Texas and New Orleans Railroad Company, a corporation of Texas, and the Louisiana Western Railroad Company, a corporation of Louisiana, for the death of Corley Gross, occurring June 1st, 1905, while he, as a fireman, was assisting in the operation of a locomotive engine drawing a passenger train on the line of the Louisiana Western Railroad Company in the State of Louisiana, by reason of the derailment of said locomotive, such injury being inflicted and the death resulting entirely within the State of Louisiana.

The pleadings, rulings and other proceedings

in the State courts of Texas were substantially the same as in the Miller case referred to, except on the points hereinafter specially mentioned and explained. Judgment was rendered against plaintiffs in error on the 30th day of January, 1909, for the sum of six thousand dollars, with interest from that date at the rate of six per cent per annum (Record, p. 23). The opinion of the Court of Civil Appeals of Texas, embracing a decision of the several points involved adversely to plaintiffs in error, was written by the Chief Justice, with references to the prior opinion in the Miller case (Record, pp. 148–153), and the petition for writ of error to have the decision reviewed by this Court, was duly allowed by the Chief Justice of that court upon the furnishing by plaintiffs in error of a bond in the sum of sixteen thousand dollars, duly approved and operating as a supersedeas (Record, pp. 240 and 241).

The points in this case involving the consideration of Section 17 of the Act of Louisiana incorporating the Louisiana Western Railroad Company were raised and disposed of in practically the same manner and by the same proceedings and rulings as set forth and shown in detail in our brief opposing the motion in the

companion case of plaintiffs in error vs. Miller, No. 831, in this Court.

The questions as to full faith and credit to the immunity provision of this incorporating act, and as to whether it was a contract within the meaning of the contract clause of the United States Constitution so as to preclude its impairment by subsequent legislation of the State of Louisiana, are raised and evidenced in the following pleadings and other proceedings embraced in the transcript of record in this cause: the pleas in abatement and to the jurisdiction (Record, pp. 6–9 and 18); order of trial court overruling and refusing same (Record, pp. 21, 22, and 26–50); plea in bar setting up the immunity provision (Record, pp. 12, 13, 20); bills of exception to admission of evidence of the Louisiana statute as amended by act of 1884 (Record, pp. 53–60); first assignment of error, being paragraph 1 of assignment (Record, p. 63); third and fourth assignments of error, being paragraphs 7 and 6 of the assignment (Record, p. 64); fifth assignment of error, being paragraph 5 of assignment of errors (Record, pp. 63–64); motion for rehearing in Court of Civil Appeals, paragraphs First, Second, Third and Fourth (Record, pp. 154–156); petition for writ

of error to Supreme Court of Texas, First Ground of Error (Record, pp. 167, 168), Fourth Ground of Error (Record, pp. 203, 204), Fifth Ground of Error (Record, pp. 206 and 207).

The point that the State courts in resorting to Article 2315 of the Civil Code of Louisiana amended by the legislative act of 1884 as a basis for the judgment, without respecting and applying the provision of that act fixing and limiting the duration of the right to a period of one year from the death, failed to give full faith and credit to a public act of the State of Louisiana is raised and disposed of by the State courts in the following pleadings and other proceedings shown in the record of this cause, to-wit: the special demurrers of defendants below (Record, pp. 10–19), and the orders overruling same (Record, pp. 21–22); the second assignment of error, being paragraph 3 of the assignment (Record, p. 63); the special pleas of defendants setting up departure in pleading and asserting the limitation of the right of action created by the laws of Louisiana (Record, pp. 14, 15, 21); bills of exception to proof of Article 2315 amended by act of 1884 (Record, pp. 53–60); fourteenth assignment of error in appellants' brief, being paragraph 20 of the assignment of errors

(Record, p. 70); motion for rehearing in Court of Civil Appeals, paragraph Second (Record, pp. 155, 156); petition for writ of error to the Supreme Court of Texas, second ground of error (Record, pp. 185, 186); third ground of error (Record, pp. 198, 199).

Each of these points involving federal questions is embraced and presented in the first, second, third and fourth assignments in the Assignment of Errors addressed to this Court and accompanying the petition for writ of error to this Court allowed by the Chief Justice of the Court of Civil Appeals of Texas (Record, pp. 245–248).

The federal questions arising in connection with the immunity provision in the incorporating act of the Louisiana Western Railroad Company having been raised and disposed of substantially in the same manner and by similar proceedings and orders in the two cases, we follow the example of counsel for defendants in error by adopting and referring to the discussion of these points in the brief of plaintiffs in error opposing the motion to dismiss or affirm filed in the Miller case, No. 831.

But the point that the State courts while resorting to Article 2315 of the Civil Code of Louisiana as basis for the right of action dis-

regarded the provision of that act fixing and limiting the period of the right created and thus deciding a federal question adversely to plaintiffs in error, having been raised in a somewhat different manner in the two cases and counsel for defendants in error having disregarded this point in their brief supporting the motion in the Miller case as well as in this case, we deem it appropriate to submit here the method and proceedings by which this question was raised and decided, as shown by the record in *this* case.

The plaintiffs below commenced this suit by filing in the District Court of Harris County, Texas, March 31st, 1906, their original petition in which, after stating the circumstances surrounding the occurrence on the line of the Louisiana Western Railroad Company, in the State of Louisiana, and showing the injury and death of Corley Gross to have occurred in that State as a result of such injuries on June 1st, 1905, the petition concludes with the following language:

> " Plaintiffs allege that the said Felix Gross is the father, and Theresa Gross is the mother, of said Corley Gross, deceased; that the said Corley Gross had no wife nor descendants; that said Felix Gross was years

of age, and said Theresa Gross was
years of age, and that their said son, Corley Gross, deceased, at the time of his death, was a strong and healthy man, twenty years of age, and earning and capable of earning one hundred dollars per month, of which amount more than seventy dollars per month was contributed to the support of his said father and mother, and he would continue to have contributed said amount to their support as long as they both lived, or either of them; that said Corley Gross left no widow nor children surviving him, having died unmarried; that by reason of the death of their said son these plaintiffs have suffered a pecuniary loss in the sum of twenty-five thousand dollars.

"Plaintiffs further say that under the statutes of the States of Texas and Louisiana, the cause of action which Corley Gross had against defendants for said injuries sustained by him, as aforesaid, survived to his said mother and father, the plaintiffs herein.

"The premises considered, the plaintiffs pray that the defendants be cited to answer this petition, and that upon final hearing they have judgment against the defendants for the amount of their said damages, as aforesaid, for all costs of suit, and for general relief, and for such they will ever pray" (Record, p. 141).

There was no other allegation in the original petition referring to the laws of Louisiana or Texas except as set forth in the language last above quoted.

The plaintiffs on May 19, 1908, filed an amended petition in the District Court of Harris County, which, after stating in detail the location and circumstances of the injury and death of Corley Gross, concludes with the following language as to the damage sustained by the plaintiffs and the basis in law for their right of recovery:

> "That the plaintiff, Felix Gross, is years of age, and the said Theresa Gross is years of age, and that their said son, Corley Gross, at the time of his death, was a strong and healthy man, 23 years of age; that plaintiffs are and were without means of support of their own, and were dependent upon their said son for a support; that he was a dutiful son, and out of his earnings, which were, to wit, one hundred dollars ($100.00) per month, he contributed to their support more than seventy dollars per month, and he would have continued to thus contribute to their support so long as he lived, and they, or either of them, lived, and that by reason of his death they have been actually damaged

in the sum of twenty-five thousand dollars ($25,000).

"Plaintiffs further represent that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them by the death of their said son, caused by their negligence, as aforesaid, which statute is similar to the statute of this State giving parents a right of action for damages for the death of their son as a result of negligence.

"Premises considered plaintiffs pray that defendants each be cited, according to law, to answer this petition; that, on trial hereof, they have judgment for their said damages, for costs of suit, and for general relief, and they will ever pay" (Record, 5, 6).

The Louisiana Western Railroad Company and the Texas and New Orleans Railroad Company, defendants below, by way of special demurrers to the amended petition claimed that the portion of the amended petition to the effect, "that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them by the death of their said son, caused by their negligence, as aforesaid, which

statute is similar to the statute of this State giving parents a right of action for damages for the death of their son as a result of negligence," constituted a departure in pleading from fact to fact and from law to law from the original pleadings and amounted to the institution of a suit on a new and different cause of action from that originally asserted by plaintiffs; and in this connection by special demurrer urged that the action sought to be prosecuted by such amendment having been filed and instituted more than two years after the alleged injury and death of Corley Gross was barred by the statute of limitation of the State of Texas in two years; and was barred and had lapsed by the laws and statutes of Louisiana in one year from the death (See Section IV*a* Answer of Louisiana Western Railroad Company, Record, p. 10, and Section III*a* Answer of Texas & New Orleans Railroad Co., Record, p. 19). These special demurrers were duly submitted to the trial Judge and overruled and exception taken to such ruling (Record, pp. 21–22).

The defendants below also entered special pleas to the portions of the amended petition setting up for the first time the Louisiana statute as a basis of action to plaintiffs for damages *sustained*

*by them* through the injury and resulting death in the following language:

"And for further plea and answer in this behalf, and in bar of plaintiffs' action herein, the defendant avers that the accident and injury and the death of Corley Gross occurred, as alleged and set forth in plaintiffs' petition, on or about June 1st, 1905, in the State of Louisiana; that the plaintiffs have filed herein their first amended original petition May 19th, 1908, in which they make the following allegation for the first time in this cause, to wit:

"'Plaintiffs further represent that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages sustained by them by the death of their said son, caused by their negligence as aforesaid, which statute is similar to the statute of this State giving parents a right of action for damages for the death of their son as a result of negligence.'

"Now this defendant avers that by such allegations, and by the context thereof, the plaintiffs have departed from their original pleading herein, and for the first time seek to declare upon and assert a cause of action existing to them by virtue of a certain statute of the State of Louisiana; and that

such alleged cause of action is set forth and sued upon by the filing of said amended petition May 19th, 1908, which is more than two years from and after the occurrence of said accident and death, and the accrual of said cause of action (if any plaintiffs have), and this defendant here specially pleads the statute of limitation of the State of Texas of two years, in bar of such right and cause of action (if any) accruing and existing to the plaintiffs by virtue of the aforesaid statute of Louisiana and by virtue of the allegations made in connection therewith in said first amended original petition; and this defendant further specially pleads against said cause of action so asserted (if any) the statutes and laws of Louisiana, by virtue of which defendant alleges the said cause of action (if any) is barred by limitation and prescription within one year from the date of the accrual of such cause of action (if any); and of this defendant puts itself upon the country." (See Section XI. Answer of Louisiana Western Railroad Company, Record, pp. 14 and 15, and Section XI. Answer of Texas & New Orleans Railroad Co., Record, p. 21).

According to the undisputed evidence and the allegations in plaintiffs' petition, the injury to Corley Gross and his resulting death occurred

on or about June 1st, 1905, in the State of Louisiana (Record, p. 3). Article 2315 of the Civil Code of Louisiana as amended by the act of 1884, giving a right of action for injuries resulting in death, was admitted in evidence under the Plaintiffs' Amended Petition, over the objection of defendants' below that it was immaterial and irrelevant (See Bills of Exception, Record, 53–60), and in the amended form this article reads as follows:

> "ARTICLE 2315: Obligation to Repair Damage Caused by Wrongful Acts: Survivorship of Action: Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be" (Record, 54).

The court admitted the evidence of this Louisiana statutory right of action on the theory

that is was admissible under the plaintiffs' amended petition, notwithstanding the contention of departure in pleading urged by defendants below in their special plea, and without regard to the express provision in Article 2315 that the right of action thereby created should obtain only "for the space of one year from the death" and had therefore lapsed and terminated before the amended petition basing the action upon this statute had been filed.

The plaintiffs in error appealed from this judgment and filed assignments of error to the action of the court both in overruling the special demurrers and in rendering judgment against them upon the facts shown under the special plea of departure and limitation. (See Assignments of Error, paragraph 3, Record, p. 63, and paragraph 20, Record, p. 70).

After the decision of the Court of Civil Appeals, adverse to these assignments, the plaintiffs in error urged the points further before that court in the second ground of their motion for rehearing (Record, pp. 155, 156), and thereafter they urged the same points in their petition for writ of error addressed to the Supreme Court of Texas by the second ground of error (Record, pp. 185, 186), and this point is embraced as para-

graph 4 of the Assignment of Errors filed herein with petition for writ of error addressed to this Court (Record, pp. 247, 248).

The original petition in this case did not mention or declare upon any statue of Louisiana, giving a right of action to plaintiffs for damages sustained by them. The only reference in that petition to a Louisiana statute is that "the cause of action *which Corley Gross had* against defendants for said injuries sustained by him, as aforesaid, *survived* to his said mother and father, the plaintiffs herein" (La. Civ. Code, 1870, Art. 2315, Record, p. 49), thus referring to a right of survival created by statute in Louisiana which did not exist in Texas at the time of the decision by our Supreme Court in the case of *T. & P. R'y Co. v. Richards*, 68 Texas, 375, and which does not exist in the State of Texas now, for it will be noted that Chapter 189 of the General Laws of the Twenty-fourth Legislature of Texas for the year 1905 provides for the survival of actions "for personal injuries *other than* those resulting in death." Therefore the claim in the original petition for injuries to Corley Gross, and damages and loss sustained by him, and the action therefor by plaintiffs, based on the statute of Louisiana, giving the right of survival

in their favor, showed no cause of action, and was subject to general demurrer (*T. & P. R'y Co. v. Richards*, 68 Texas, 375).

The other claim embraced in the original petition was: "That by reason of the death of their said son, these plaintiffs have suffered a pecuniary loss in the sum of twenty-five thousand dollars." And they afterwards prayed judgment for these items, but there is in that petition no reference whatsoever to, or declaration upon, any law of the State of Louisiana in connection with this claim, so as to show jurisdiction in the Texas court, on principles of comity, to administer the statute laws of Louisiana (if any) applicable to the subject-matter (*R'y. Co. v. McCormick*, 71 Texas, 660; *De Harn v. R'y Co.*, 86 Texas, 71); and the Texas court having no power, under the decisions of this State, to take judicial notice of the statutory right of action of Louisiana created by the legislative amendment of 1894 (*Faulk v. Faulk*, 23 Texas, 653; *Anderson v. Anderson*, 23 Texas, 640; *Bradshaw v. Mayfield*, 18 Texas, 28; *Trigg v. Moore*, 10 Texas, 200; *Hill v. George*, 5 Texas, 91; *Bryant v. Kelton*, 1 Texas, 434; *Smith v. Smith*, 1 Texas, 625; *Jones v. Laney*, 2 Texas, 342–350; *Blethen v. Bonner*, 93 Texas,

141), was without jurisdiction over this claim on the face of the petition, and as to this feature of the case, it was subject to general demurrer (*De Harn v. Mexican National R. R. Co.*, 86 Texas, 71; *Id.*, (T. C. A.), 22 S. W., 249; *Mexican Central R'y. Co. v. Mitten* (T. C. A.), 36 S. W., 282; *Mexican Central R'y. Co. v. Goodman*, 48 S. W., 778). Hence the original petition set up no cause of action cognizable by the Texas courts, and was subject to general demurrer.

The amended petition abandoned the reference to the Louisiana statute giving the right of survival to parents of the right of action which had accrued to Corley Gross for the injuries to him, and makes no claim in behalf of his parents for such loss and damage to him on the basis of a surviving action; but renews and amplifies the claim "that by reason of his death they (the plaintiffs) have been actually damaged in the sum of twenty-five thousand dollars." And in this connection, and as a legal basis for this claim, for the *first* time, the amended petition makes this allegation: "And that by reason of his death *they* have been actually damaged in the sum of twenty-five thousand dollars.

"Plaintiffs further represent that by the statute law of the State of Louisiana they are given a right of action against defendants, and each of them, for the damages *sustained by them* by the death of their said son, caused by their negligence, as aforesaid, *which statute is similar to the statute of this State* giving parents a right of action for damages for the death of their son as a result of negligence" (Record, pp. 5, 6).

Now, we contend that the declaration thus made for the first time in the amended petition, of the alleged existence and effect of a statutory right of action and remedy in the State of Louisiana for the damages sustained by plaintiffs for the death of their son, involves such departure, from the original petition, from fact to fact and from law to law, as to constitute practically the assertion of a new cause of action; that the statute of limitation was not suspended by the filing of the original petition, and has run against this new cause of action, now asserted, up to the filing of the amended petition, more than two years after the date of the alleged occurrence, and the accrual of this cause of action.

Having this view of the amended petition as involving a departure from law to law amounting to the assertion of a new and distinct right

of action not declared upon in the original petition (*Ry. Co. v. Wyler*, 158 U. S., 285–298; *Whalen v. Gordon*, 95 Fed. Rep., 314), the plaintiffs in error contended that Article 2315 of the Louisiana Civil Code as amended by the act of 1884 relied on for the right of action in this case having by its own provisions fixed and limited the life and duration of the right so created, such limit so fixed was a part of the right, going with and enforcible as a part of the right of action in whatever jurisdiction it might be asserted (*Whalen v. Gordon*, 95 Fed. Rep., 314; *Boyd v. Clark*, 8 Fed. Rep., 852; *The Harrisburg*, 119 U. S., 199; *Davis v. Mills*, 194 U. S., 451–457), and the State courts having considered and adopted the Louisiana statute as the indispensable basis for the judgment through the medium of the amended petition filed more than two years after the death, thus ignoring the provision of the Code which fixed and limited the period of the right created by it, necessarily failed to give full faith and credit to a public act of the State of Louisiana (*Ry. Co. v Iowa Homestead Co.*, 123 U. S., 552; *L. & W. Co. v. San Jose Ranch Co.*, 189 U. S., 179–181, *Fire Association v. New York*, 119 U. S., 110–129).

Adopting and urging in this connection and in addition to the matters here presented, the brief of plaintiffs in error in opposition to the motion in the companion case of plaintiffs in error vs. Miller, No. 831 in this Court, we respectfully insist that the record in this cause involves substantial points decided adversely to plaintiffs in error for the review of which this Court has jurisdiction, and that the points involved are of such importance as to call for a review of the judgment and proceedings of the State courts; and disavowing any purpose to delay the final hearing and adjudication on the matters involved, we ask that the motion of defendants in error to dismiss the writ of error or affirm the judgment may be denied.

MAXWELL EVARTS,
H. M. GARWOOD,
A. L. JACKSON,
Of Counsel for Plaintiffs in Error.

# TEXAS & NEW ORLEANS RAILROAD COMPANY *v.* GROSS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 832. Submitted April 17, 1911.—Decided May 15, 1911.

Decided on authority of *Texas & New Orleans R. R. Co.* v. *Miller, ante*, p. 408.

THE facts are stated in the opinion.

*Mr. Maxwell Evarts*, with whom *Mr. H. M. Garwood* and *Mr. A. L. Jackson* were on the brief, for plaintiff in error.

*Mr. J. W. Parker* for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a companion case with *Texas & New Orleans R. R. Co.* v. *Miller*, just decided, *ante*, p. 408, and arose out of the derailment of the same engine. It took substantially the same course in the state courts, (128 S. W. Rep. 1173) and presents substantially the same questions.

For the reasons given in the other case, the motion to dismiss is denied, and that to affirm is granted.

*Affirmed.*